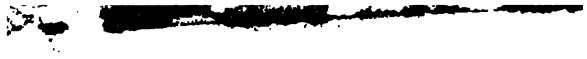


A

SUPPLEMENT

TO

THE LAW AND PRACTICE

OF

INJUNCTIONS,

BY

CHARLES STEWART DREWRY, ESQ.

BARRISTER AT LAW.

CONTAINING THE CASES DECIDED SINCE THAT

LONDON:

S. SWEET, 1, CHANCERY LANE, FLEET STREET,

Law Bookseller and Publisher;

HODGES AND SMITH, GRAFTON STREET, DUBLIN.

1840.

PRICE FIVE SHILLINGS.

A

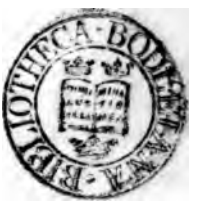
SUPPLEMENT

TO

THE LAW AND PRACTICE

OF

INJUNCTIONS,



BY

CHARLES STEWART DREWRY, ESQ.

BARRISTER AT LAW.

CONTAINING THE CASES DECIDED SINCE 1841.

LONDON:

S. SWEET, 1, CHANCERY LANE, FLEET STREET,

Law Bookseller and Publisher;

HODGES AND SMITH, GRAFTON STREET, DUBLIN.

1849.

LONDON:
C. ROWORTH AND SONS, PRINTERS,
BELL YARD, TEMPLE BAR.

SUPPLEMENT

TO THE

TREATISE ON INJUNCTIONS.

PART I.

OF STAYING PROCEEDINGS AT LAW AND IN OTHER COURTS.

CHAPTER I.

Of Injunctions to stay Proceedings at Law where the Legal Title of the Defendant in Equity is founded originally on some inequitable Transaction; or is against Public Policy; or where, although the Legal Title of the Defendant in Equity may not have been originally inequitable, it has been tainted with Fraud, actual or constructive, by the subsequent Conduct of the Party claiming under it.

1. WHERE a young man, an officer in the army, who had very recently attained his majority, became liable, upon

bills of exchange, for the accommodation of his superior officer, to the defendant, a money lender by profession, and upon negociations for getting in the bills, the defendant agreed to postpone the payment of them for twelve months, and induced the plaintiff, upon representations of his trouble and expense in procuring the postponement of the bills, to give him, in consideration of such trouble and expense, a further promissory note; the Court, not finding in the answer a satisfactory explanation of these transactions, sustained an injunction against the defendant proceeding at law upon his securities (*a*).

In a recent case an attempt was made to contend that the Court could not restrain the East India Company from paying money due on East India bonds, to a person alleged to have obtained fraudulent possession of them; on the ground, first, that such bonds pass by delivery, and are payable to the holder like bank notes; secondly, that the interference of the Court would tend to depreciate the East India Company's securities; but the Court held that it had jurisdiction as incident to its inherent jurisdiction in all cases of fraud (*b*), unless expressly restricted by the legislature; and that by the East India Company's Act, 51 Geo. 3, c. 64, s. 4, the Court was not so restricted.

2. Where money has been lent in a foreign country, to be used in gaming in such country, and there is nothing to show that the games were illegal according to the law of the country in which they were played, equity will not restrain an action to recover the debt (*c*).

3 (*d*). On similar grounds to those on which *Gray* v. *Matthias* (*e*) and cases of that class were decided, Lord Langdale, M. R., dismissed a bill which sought a declaration that a lease granted by the plaintiffs was invalid, and

(*a*) *Lloyd* v. *Clark*, 6 Beav. 309; and see p. 3 of the Treatise.
(*b*) *Glass* v. *Marshall*, 15 Sim. 71.
(*c*) *Quarrier* v. *Colston*, 1 Phil. 147.
(*d*) See p. 11 of the Treatise.
(*e*) 5 Ves. 286.

to have a reconveyance and the lease delivered up. His Lordship held the lease absolutely void, and therefore that the plaintiffs might recover in ejectment, and did not want a reconveyance; and although the lease was not invalid upon the face of it, and would therefore be a document which the plaintiffs would be entitled to have delivered up, if they could not try its validity at law, yet as they were in a position to have its validity tried at once, the Court held that the bill could not be sustained as a bill to have the void lease delivered up (*f*).

4. In a case where persons of mature age, dealing with A., took from his niece, B., a guarantee for money due to them from A., with knowledge that A. had been B.'s guardian; that B. had but recently attained her majority, and that she then lived with and under the protection of A. and his family; the Court granted an injunction restraining an action against B. for the money for which she had given her guarantee (*g*).

With respect to the effect of instruments executed while in a state of intoxication, the doctrine of *Johnson* v. *Medlicott* (*h*) and *Cooke* v. *Clayworth* (*i*) has received some qualification from the very recent case at law of *Gore* v. *Gibson* (*k*), in which it was decided that it is only partial intoxication which does not relieve a man against his contract, but that if the drunkenness is so complete that a man is incapable of knowing what he is about, and the party contracting with him is cognizant of his state, he shall not enforce the contract of the drunken man against him.

5. On this point, see also *Spurret* v. *Spiller* (*l*) and *Lee* v. *Lockhart* (*m*).

(*f*) *Corporation of Arundel* v. *Holmes*, 4 Beav. 325; see also *Smyth* v. *Griffin*, 7 Jurist, 101.

(*g*) *Maitland* v. *Irving*, 15 Sim. 437; and see p. 18 of the Treatise.

(*h*) 3 P. Wms. 130, note A.

(*i*) 18 Ves. 12; and see Treatise, p. 20.

(*k*) 9 Jurist, 140.

(*l*) 1 Atk. 105.

(*m*) 3 Myl. & Cr. 302; and see p. 21 of the Treatise.

6(*n*). The judgment in the case of *Barnard* v. *Sutton* (*o*) contains important observations on the question when equity will and when it will not interfere between parties to a contract against public policy. The case was decided on other grounds.

7(*p*). In a very recent case, on a motion to restrain the defendant in equity from proceeding in an ejectment, the plaintiff in equity was proprietor of a colliery, and the defendant was perpetual curate of some land through which the plaintiff desired to make a railway. The plaintiff, acting under the compulsory powers of an act of parliament, after giving due notice to the defendant, had taken possession of his land, and constructed the railway through it, the defendant neither assenting nor dissenting. Afterwards disputes arose about the compensation, and then the defendant brought an action of ejectment; on a motion to stay the proceedings, the defence made by the answer was, that the defendant had not opposed the construction of the railway, because he thought he should not continue to be the incumbent after a given time, and because he thought the plaintiff had the power to proceed under the act. The Court treated the case as one of acquiescence, and stayed the ejectment, putting the plaintiff on terms to give judgment in the action to be dealt with as the Court should direct, and to pay into Court a sufficient sum to be a security to the defendant for the price of the land (*q*). On the same principle of acquiescence, a party may, by acquiescing in the creation of a nuisance, deprive himself of his right to sue at law for damages on account of the nuisance. This was decided in two old cases (*r*), and to the same effect is *Williams* v. *Earl of Jersey* (*s*). And it is clear that if a person in possession of land,

(*n*) See p. 22 of the Treatise.
(*o*) 7 Jurist, 685.
(*p*) See p. 35 of the Treatise.
(*q*) *Powell* v. *Thomas*, 6 Hare, 300.
(*r*) Case of the watercourse; and *Short* v. *Tayler*, 2 Eq. Cas. abridged, 522.
(*s*) 1 Cr. & Phil. 91.

knowing that another claims it, the claim of that person having been of course distinctly made, will, with his eyes open, lay out money upon the land, he will not be aided by injunction to keep the lawful owner out of possession, unless he will reimburse the party in possession the expenditure he has made (*t*).

An important distinction exists between the effect of acquiescence as a ground of demurrer to a bill for an injunction, and as a ground for resisting merely the injunction. In the first instance, the acquiescence must be such as wholly to disentitle the plaintiff to any relief; in the second, acquiescence falling short of that degree may be a sufficient defence (*u*).

The case referred to turned upon two points: first, whether certain buildings erected and used by a company for the purpose only of housing and repairing their engines and carriages, and not as a station, in the ordinary sense of the word, constituted *public* buildings, &c. within the meaning of the act under which the company acted; and, secondly, whether the acquiescence of the plaintiff had been such as to preclude him from obtaining an injunction. It appeared that he had continually objected to the proceedings of the company, though he had taken no proceedings so long as he was led by them to believe that such proceedings were merely temporary; but on their asserting a right to do the acts objected to, the plaintiff filed his bill without any further delay. On both points Lord Langdale, M. R., thought the plaintiff entitled to an injunction. Afterwards an appeal motion was heard by the Lord Chancellor, who directed the opinion of a court of law to be taken on the construction of the act. The report does not state whether his Lordship continued the injunction in the meantime.

8 (*x*). The jurisdiction to prevent a party from proceed-

(*t*) *Master of Clare Hall* v. *Harding*, 6 Hare, 273.

(*u*) *Gordon* v. *The Cheltenham Railway Company*, 5 Beav. 229.

(*x*) See p. 40 of the Treatise.

ing against another, under the Bankruptcy or Insolvency Acts, has been exercised under particular circumstances(*y*). But where there are no equitable circumstances to prevent a party from exercising his common law right of proceeding against another under the Insolvent Debtors' Act, he will not be restrained from proceeding to obtain a vesting order (*z*).

9. An injunction will not be granted to restrain an action against a surety, because the obligee, after having commenced an action against the principal, takes from him without the obligor's privity a *cognovit*, with a stipulation that judgment shall not be entered up nor execution issued till a given day, that day being earlier than it would have been possible to obtain judgment in the action. The Court said, by the arrangement complained of, time was not given, but the remedy was accelerated (*a*).

(*y*) *Attwood* v. *Banks*, 2 Beav. 192.

(*z*) *Anon.* Rolls, 8 Jurist, 1085. See also *Perry* v. *Walker*, 1 You. & Coll. C. C. 672; *S. C.* 6 Jurist, 846.

(*a*) *Hulme* v. *Coles*, 2 Sim. 12.

CHAPTER II.

Of Injunctions to stay Proceedings at Law where the Plaintiff in Equity has some equitable Right to set up against the Plaintiff at Law, of which the Court of Law cannot, either by reason of Want of Jurisdiction, or by reason of its Forms of Proceeding, take cognizance; or where the Legal Right of the Plaintiff at Law is coupled with, and abridged by, some Equitable Liability.

1. IT must not be assumed that against every mistake of fact, equity will relieve. Where mistake is in reality only another name for neglect in a party to use those means of information which are open to him, he is bound by his act, although it be a mistake of fact. Thus, where exchanges of lands being in progress under the 6 & 7 Will. IV. c. 115 and 3 & 4 Vict. c. 31, B. executed to the commissioner a written consent under the act to exchange certain lands for others belonging to N., for which it was clear he had not intended to exchange them, but B. had the means of knowing that the lands which he consented to take were not such lands as he intended to consent to take; the House of Lords sustained an injunction restraining B. from proceeding against N., the exchangee, in ejectment, and refused an injunction to restrain the commissioner from

(a) See p. 48 of the Treatise.

executing his award, and to restrain N. from committing waste on the lands of B. allotted to him (*b*).

In a very recent case an attempt was made to obtain an injunction where the plaintiffs had paid money into court under a mistake as to the legal consequences of such act, and the effect of it was to give certain defendants a legal title to take the money out; but the Court refused to restrain the defendants from so doing, on the ground that a mistake as to the legal consequences of an act did not call for the interference of equity (*c*).

2 (*d*). Where the purchaser of premises from the sheriff, under a sale in pursuance of an execution, obtained possession, but no assignment, so that he had not the legal title, and the question between him and the defendant was whether the sale was regular or not, a question which would not be at all tried in ejectment, the defendant in equity was restrained from proceeding in ejectment against the purchaser of the premises; and liberty was given to the latter to take such proceedings at law as he might be advised, to try the legality of the sale, and to perfect his title at law (*e*). So where the allegation of the bill and affidavits were, that A. being indebted to B., B. in his lifetime desired A. not to return the money, but to hold it for C., and that B. never in his lifetime called upon A. to pay him, and after B.'s death his executor brought an action against A. for the debt, an injunction was granted to restrain the action at the suit of the alleged cestui que trust, the money being brought into court, on the ground that the real question, which was whether a trust was created by B. in favor of C., could not be tried in the action (*f*).

Both these cases proceed on the principle, that equity

(*b*) *Duke of Beaufort* v. *Neeld*, D. P., 12 Clark & Fin. 248; *S. C.* 9 Jurist, 813.

(*c*) *The Great Western Railway Company* v. *Cripps*, 5 Hare, 91.

(*d*) See p. 63 of the Treatise.

(*e*) *Jones* v. *Hughes*, 1 Hare, 383.

(*f*) *M'Fadden* v. *Jenkins*, 1 Hare, 458.

will not suffer proceedings at law where there is some equitable claim set up by the plaintiff in equity, which, owing to the forms of legal proceedings generally, or of the particular legal proceedings, cannot properly be tried in them. The following case is referrible to a different principle, viz. that equity will not suffer proceedings to be taken at law where proceedings, in which full justice could be done, have already been taken in equity.

In the case referred to, an estate had been the subject of an administration suit, and had been fully administered, the executor having every opportunity of examining every charge upon the estate and every particular constituting it; he was, on that ground, restrained from continuing actions brought without the leave of the court, against persons parties to the suit, to recover property belonging to the testator (*g*). But care must be taken not to confound with cases of this sort, cases where, although A. may have not only a legal right but an equity as against B., he has a purely legal right or none at all against B.'s creditor. Thus, where A. had let to B. a furnished house, and C., a judgment creditor of A., caused the sheriff to seize the furniture comprised in the lease, the Court refused an injunction, on the ground, that if B. had any title against C. it was legal, and his remedy was at law (*h*). And in a recent case, where the plaintiffs, farmers, had agreed with their father for the use of a barn and yard on his premises, wherein to put their carts and farming implements; and the defendant, a judgment creditor of the father, seized in such barn and yard goods of the plaintiffs as well as of their father; the Court refused an injunction to restrain the sheriff from selling, on the ground, that as no trust was made out, the Court would not interfere (*i*). And here it may be observed, that as equity will of course not interfere where the plaintiff in equity has a good defence at law, so where there are several answers by the defend-

(*g*) *Oldfield* v. *Cobbett*, 6 Beav. 515.
(*h*) *Garstin* v. *Asplin*, 1 Mad. 150.
(*i*) *Jackson* v. *Stanhope*, 10 Jurist, 676.

ant at law to the claim of the plaintiff at law, and one only is an equitable answer and the others are, if good defences, purely legal, equity will not stay the proceedings at law; because to do so, would tie up the plaintiff at law from proceeding till the cause is heard in equity, and then if the plaintiff in equity is wrong in his equity, the plaintiff at law is still to seek his remedy; and because if the defendant at law succeeds there, there is no question for equity to adjudicate upon (*k*).

3 (*l*). In a late case an attempt was made to deny the right of a mortgagee to sue on his covenant, at the same time proceeding to sell under his power of sale; on the ground that the price agreed to be paid by the purchaser exceeded the mortgage debt, the bill impeaching at the same time the sale. The Court refused to restrain the mortgagee, treating the case as plain (*m*).

4 (*n*). In ascertaining whether a bill in equity is the proper course, where the defendant would have a title at law to set up some demand, care must be taken to distinguish whether there is *equitable set-off*, which is, where the equity of the bill impeaches the very demand of the plaintiff at law, as in *O'Connor* v. *Spaight* (*o*); or whether there are specific cross demands, as in the case of *Whyte* v. *O'Brien* (*p*). For where the case is simply one of specific cross demands, as where the plaintiff at law sues upon a clear breach of a contract, and the plaintiff in equity files a bill to restrain the action, on the ground of a complicated account between the parties in reference to dealings arising out of the contract ultra the particular breach, equity will not stay execution of a judgment obtained by the plaintiff at law until the account is settled. The equity, it would seem, must be, not that if the defendant at law pays the demand

(*k*) *Barnard* v. *Wallis*, 1 Cr. & Phil. 85.

(*l*) See p. 68 of the Treatise.

(*m*) *Willes* v. *Levett*, 1 De Gex & Sm. 392

(*n*) See p. 74 of the Treatise.

(*o*) 1 Scho. & Lef. 305.

(*p*) 1 Sim. & Stu. 551.

of the plaintiff at law, it may turn out that upon setting that off against the balance due from him on the general account, he will have had too much, but that the very substance of his demand at law is cut down by something which cannot be ascertained until the general account is taken. The subject is fully discussed in the elaborate judgment of Lord Cottenham in *Rawson* v. *Samuel* (*q*), in which his Lordship has reviewed the authorities and clearly defined the principle of the jurisdiction to interfere on the ground of cross demands.

It was held in a case of *Morris* v. *Day* (*r*), that mere complexity of account, even where there are cross demands, will not induce a court of equity to restrain an action; not on the ground of want of jurisdiction, for the Court said, if the bill had been filed first, it would have stayed an action, but on the ground that the account might be as well investigated by arbitration as by the Master; and still less will mere complexity afford ground for staying an action, where the account is entirely one-sided (*s*). It may be doubted, however, whether the general doctrine of *Morris* v. *Day* can be supported consistently with the very recent decision of the House of Lords in *The Taff Railway Company* v. *Nixon* (*t*). In that case a contract had originally been made between Nixon and the Railway Company: by that contract Nixon was to do certain works for a specified sum, subject to certain deductions or increases, with a provision for payment of extra work at prices specified. Nixon had advances of money from Storm, and to secure him, assigned to him the payments he Nixon was to receive under the contract. Afterwards, to secure Storm further, a new contract was entered into, to which Nixon, Storm and the company were parties; and the effect of that contract was, that the two became joint contractors with the company for the works which were to be per-

(*q*) *Rawson* v. *Samuel*, 1 C. & Phil. 161. See also *Clark* v. *Cort*, 1 C. & Phil. 154.

(*r*) 4 Y. & Coll. Exch. 475.

(*s*) *South-Eastern Railway Company* v. *Martin*, 12 Jurist, 1062.

(*t*) 1 Cl. & Fin., House of Lords Ca. 111.

formed under the contract originally entered into by Nixon alone. Under this contract the works were done, and in addition to the works jointly done, Storm executed works independently of Nixon for the company—all the money transactions were with Storm. The result of all this was, that there was an account between Storm and Nixon and the company on account of the joint contract; and there was also an account of the payments due under the original contract. The company paid all the monies generally, and by their answer said they were unable to say to which of the accounts particular payments were to be referred. In this state of things, with a complicated account between Nixon and the company, and as between Nixon, Storm and the company, the necessity of ascertaining to which contract and to which works the payments made were to be referred, Nixon filed his bill against the company and against Storm's assignees (Storm having become bankrupt) for an account of what was due from the company in respect of the original contract, and for an account as between himself and Storm's assignees. The question was whether such cross demands were proper for a court of law only, or whether the account ought to be taken in equity; and the House of Lords decided upon the principle laid down in *O'Connor* v. *Spaight* (cited *supra*), that it was fit that it should be taken in equity.

It will not be forgotten that the rule in *O'Connor* v. *Spaight* is, that an account is only proper to be taken in equity where there are cross demands, in cases where it can only appear from the result of a general account what is due to the party who would be plaintiff at law, and when such account is too complicated to be examined on a trial at nisi prius. And it will be observed, that this is the distinction between such cases as *The Taff Railway Company* v. *Nixon* and *Rawson* v. *Samuel*(*u*).

From the very nature of this sort of case, it will always

(*u*) See also on the principle of this jurisdiction, *South-Eastern Railway Company* v. *Martin*, 13 Jurist, 1.

be of course a matter of great difficulty to determine within which class of authorities a particular case falls. But I apprehend that the cases above referred to warrant these general conclusions as to the *principle* that must be kept in view in considering such cases.

I. That equity will not interfere where there is a specific demand on the one side, merely because in a general account between the parties, it may turn out that the party making the specific demand will have received under it more than he can set off against it.

II. That to support the interference of equity, an account must be requisite before the specific demand at law can be ascertained, and that account must be so complicated as to be unfit for a jury.

III. That if the account can be taken by a jury, equity will not interfere, even though it may be necessary that the account should be taken before the demand can be ascertained; in other words, to induce equity to interfere, there must be both *equitable* set-off, within the doctrine of *Rawson* v. *Samuel,* and such complexity in the account that a jury could not take it.

CHAPTER III.

Where Relief is sought against Forfeiture or Penalties incurred by the Breach of Covenants or the Neglect of other legal Liabilities.

ON the question of relief against breach of covenants in leases, see *Algar* v. *Murrell* (*a*), in addition to the cases referred to on this point in the Treatise (*b*).

(*a*) Vide 6 Jurist, 775. (*b*) Page 80 *et seq.*

CHAP. IV.

Of the Jurisdiction in general.

1. THE Court of Chancery has refused to grant an injunction to stay assignees in bankruptcy from proceeding in the bankruptcy, by making a dividend or otherwise, when the plaintiff's only claim was as a general creditor (*b*). "My opinion is," said the Vice-Chancellor of England, "that this Court has no jurisdiction simpliciter to restrain the assignees from making a dividend of that which is admitted to be the estate of the bankrupt. . . . If the question had been whether any assets, any personal estate, or any species of property which was in the hands of the assignees as part of the bankrupt's separate estate, was in fact the property of the plaintiff, this Court would, I apprehend, decide the question, because the jurisdiction in bankruptcy has authority to deal only with that which is the bankrupt's estate, but has no power to determine what *is* the bankrupt's estate. If the question is a legal one, it must be tried at law; and if it be an equitable one, it must be decided in equity. But where you have determined what is the property of the bankrupt, the whole administration of it falls under the jurisdiction of the Court in Bankruptcy (*c*)."

(*a*) See as to *Duncan* v. *M'Almont*, cited in the Treatise, p. 98, 3 Beav. 306.
(*b*) *Halford* v. *Gillow*, 14 Sim. 44.
(*c*) *Halford* v. *Gillow*, 14 Sim. 49.

There is always considerable difficulty in distinguishing between absence of jurisdiction, and the refusal to exercise it; but it may be thought that, looking at the cases already cited on the question of jurisdiction (*d*); looking at the well settled doctrine that the Court by granting an injunction, does not assume jurisdiction over any other Court, but merely over the persons parties to the suit; this was not a case of absence of jurisdiction, but of refusal, and doubtless well founded refusal, to exercise it; and that the language of the Court is to be read in that sense (*e*).

2. On restraining of proceedings in the same Court, when the suits are not precisely for the same matter (*f*), see *Rigby* v. *Strangways* (*g*), in addition to the cases cited in the Treatise (*h*).

3. On restraining proceedings in other Courts, on the mere ground of the Court having drawn the matter within its own jurisdiction, see on the same point as in *Sutton* v. *Mashiter* (*i*), *Oldfield* v. *Cobbett* (*k*).

Under this head also may be ranged the case of *Stubbs* v. *Sargon* (*l*), where a purchaser of book debts under the order of the Court, being, as a condition of his purchase, entitled to have delivered to him a particular set of account books, of which he was unable to obtain possession, commenced an action of trover against the vendor. It was held that this proceeding was wholly irregular, and the action was stayed.

4. I. On the principle that the Court will not stop a creditor at law, unless there is a decree under which he can go on, it has been held that where the bill was not on behalf of all creditors, and the decree was only contingently a decree

(*d*) See in the Treatise, pp. 96, 97.

(*e*) See in addition to the cases cited in the Treatise, p. 100, n. (*p*), *Gingel* v. *Horne*, 9 Sim. 539; *Allen* v. *M'Pherson*, 1 Phil. 133.

(*f*) See pp. 105, 106 of the Treatise.

(*g*) 2 Phil. 175.

(*h*) See pp. 105, 106.

(*i*) 2 Sim. 513.

(*k*) 6 Beav. 515.

(*l*) 4 Beav. 90.

for their common benefit, a creditor could not be restrained from proceeding at law (*m*).

In considering the protection given to an executor against creditors at law, it must also be remembered that the executor takes, of course, only that which was the testator's; and that, therefore, if, at the time of the testator's death, a creditor had a lien amounting to a *dominium* over any part of the testator's property, the executor cannot restrain the creditor from exercising his legal right. This point arose in *Rankin* v. *Harwood* (*n*). In that case the creditor, Kirk, obtained a judgment in December, 1845; and on the 7th April, 1846, a writ of *fi. fa.* was placed in the hands of the proper officer for execution. The debtor died on the 6th April. During the lifetime of the debtor, a mortgagee's bill for an account was filed, and on his death the mortgagee filed a bill of supplement and revivor against the debtor's executor. In the two suits a decree was made in June, 1846. In July, 1846, the sheriff took possession, under the *fi. fa.*, of certain goods of the testator; and the executor immediately moved for an injunction to restrain him from removing or selling such goods, and to restrain the creditor from proceeding in his action. Sir J. Wigram, V. C., refused the motion: he said, if the writ had been put into the hands of the sheriff before the death of the debtor, then, beyond all question, the creditor might have taken them in execution, even in the hands of a purchaser (except in market overt), from the executor. "At the death of the testator," said his Honor, "supposing the writ to have been then in the hands of the sheriff, the creditor had a dominion over the goods paramount to that of the executor; or, in other words, the amount of the assets of the testator over which the executor had dominion, adverse to the creditor's right, was the amount of the gross assets minus the amount of the creditor's claim." Then the writ, when put into the hands of the sheriff, taking effect by re-

(*m*) *Rankin* v. *Harewood*, 2 Phil. 24. (*n*) 5 Hare, 215.

lation, as from the teste of the writ, (which was before the testator's death), his Honor held that the creditor could not be enjoined.

II. (*o*) If the executor shows what are the assets, and the plaintiff at law had notice of the decree before he issued his writ, the plaintiff at law will have no costs of the action or of the motion (*p*). In *Burnett* v. *Burnett* (*q*), under similar circumstances, the injunction was granted, but costs were reserved. In that case, however, the decree specially noticed the debt of the plaintiff at law, and directed the Master to inquire whether any steps should be taken with regard to his claim. The Court expressly guarded itself against laying down any rule by this case.

III. On the question of the distinction between the cases where the judgment at law is *de bonis testatoris*, and where it is *de bonis testatoris, et si non de propriis* (*r*), some important cases have been decided since the publication of the Treatise. In a very recent case (*s*), the plaintiff at law was proceeding under a judgment against the testator, in an action against the executors, to recover execution *de bonis testatoris*. The executors pleaded *plene administravit*. The cause was set down, and shortly to be heard. Before it was heard, a decree was made in a creditors' suit, and then the executors moved to stay the action on the same ground as in *Brook* v. *Skinner* (*t*), that the executors' plea would be falsified, and then the plaintiff at law would recover *de bonis propriis*. But Sir L. Shadwell, V. C. E., thought that, on the evidence before him, it appeared that the executors had not assets in their hands sufficient for the payment of debts, so that in effect their plea was not a false plea, and therefore his Honor granted the injunc-

(*o*) See p. 110 of the Treatise.

(*p*) *Jones* v. *Brain*, 2 Y. & Col. C. C. 170.

(*q*) 10 Jurist, 4.

(*r*) See p. 113 of the Treatise.

(*s*) *Vernon* v. *Thellusson*, 7 Jurist, 503.

(*t*) 2 Mer. 481, n.

tion. On appeal the Lord Chancellor affirmed the decision, but not merely on the ground assigned by the Vice-Chancellor. His Lordship's reasons were, first, that upon the plea of the executors being falsified, the judgment would not be *de bonis propriis*, but only *de bonis testatoris* (*u*); the result of which would be, that the assets would be withdrawn from the general fund, which ought to be distributed in equity for the benefit of the whole of the creditors; secondly, that independently of the general question, the plea not having been filed till after the decree had been obtained and notice of it served, it was obvious it had only been filed to enable the executors to apply to this court (*x*); and, lastly, that the account given of the state of the assets by the executors was satisfactory (*y*).

In another case, before Lord Lyndhurst, C., the suit was a creditors' suit against the real and personal estate of an intestate. After decree, the heir moved for an injunction to restrain proceedings in an action brought by a bond creditor. The heir had pleaded *riens per descent*, and the motion was opposed on the ground, that if the plaintiff at law falsified this plea, he would be entitled to judgment against the heir *de bonis propriis*. But the Lord Chancellor granted the injunction generally; on the ground that, although if the plea were falsified, the creditor would be entitled to execution against the heir to the value of the lands which he had by descent; yet on paying the amount, the heir would be entitled to hold the land discharged (*z*); so that the result would be in effect to take the particular creditor's debt out of the real assets of the intestate as much as if execution had been against the assets, and that, his Lordship added, in a case where the decree had priority over the judg-

(*u*) See, p. 120 of the Treatise, and the authorities there cited.

(*x*) *Fielden* v. *Fielden*, 1 Sim. & Stu. 255. See Treatise, p. 115.

(*y*) 1 Phil. 466.

(*z*) *Buckley* v. *Nightingale*, 1 Str. 665.

ment (*a*). This case is not inconsistent with the principle of *Price* v. *Evans* (*b*), so far as it protects the assets of the testator or intestate from being dealt with at law for the particular creditor. But, as regards the relative positions of the creditor and the heir, the effect of Lord Lyndhurst's order would, it is apprehended, be very different from that of the Vice-Chancellor. By the special order made in *Price* v. *Evans*, the assets of the intestate would be withdrawn from the particular creditor, to be administered in equity. The heir would be left unprotected as to his personal liability at law, which would be measured by the value of the lands come to him by descent; the creditor would therefore be paid. As between the heir and any other creditor proceeding at law, if there were no decree in equity, no doubt the heir would be entitled to hold the intestate's land discharged, to the extent to which he had personally paid the previous debt. But it is quite clear, that by the effect of the decree in equity, the heir would practically lose his right to hold the lands of his intestate discharged, unless the decree were to be mere words without force, because the decree fastens the debts of the other creditors upon the land withdrawn from the action. The effect of Lord Lyndhurst's order in *Rouse* v. *Jones* would be very different. It would protect the heir against his personal liability at the expense of the particular creditor who sued at law; in other words, it would interfere with that legal right which the heir gave to the plaintiff at law, as against him personally, by setting up a false defence. Whether his Lordship considered that the exercise of such a right in the creditor would be inequitable, if the assets were withdrawn from the claim of the heir to recompense himself out of them: or whether his Lordship overlooked this effect of his order; or whether, not overlooking it, he thought a divided injunction could not be granted, does not appear by the report. Nor does it appear whether this peculiar

(*a*) *Rouse* v. *Jones*, 1 Phil. 462. (*b*) 4 Sim. 514.

consequence of granting an injunction simpliciter was called to his attention. On the whole it may be doubted whether Lord Lyndhurst meant to do more than was done in *Price* v. *Evans* and *Kent* v. *Pickering*, viz. to protect the assets.

The general conclusion (*c*) on this subject that I submit must now be arrived at is, that if a judgment at law is *de bonis testatoris, et si non de propriis*, the Court will take care by some order to prevent the assets from being withdrawn from the general fund for the payment of creditors; but whether it will do so by restraining the proceedings at law generally, or by a special order protecting the assets only, without prejudice to such rights at law against the representative personally, as the creditor may have, must, in the present state of the authorities, be considered as unsettled.

5. On the same principle as that of the cases referred to in the Treatise (*d*), where a receiver had been appointed, the Court restrained a company from proceeding without the leave of the Court to summon the trustees of the property before the justices, under the authority of the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18, s. 85) for assessing the value of the land, preparatory to taking compulsory possession of it (*e*).

See also, on the subject of restraining the officers of the Court from seeking redress in other Courts, *Ambrose* v. *Dunmow Union* (*f*).

(*c*) See in p. 122 of the Treatise the third conclusion drawn from the then existing authorities.

(*d*) Page 127 *et seq.*

(*e*) *Tink* v. *Rundle*, 10 Beav. 318.

(*f*) 8 Beav. 43.

PART II.

OF INJUNCTIONS TO STAY WRONGFUL ACTS OF A SPECIAL NATURE.

CHAPTER I.

Injunctions against Waste.

1. IN addition to the cases on this head referred to in the Treatise, may be mentioned the two following cases, *Morris* v. *Morris* (*a*) and *Blagrave* v. *Blagrave* (*b*).

Morris v. *Morris* decided that ornamental timber will be protected, even though the mansion-house to which it was originally appurtenant has been pulled down, at least if there is any power in the settlement under which by possibility those in remainder may have an interest in preserving the timber. In the case referred to, there was a power in the settlement to demise to persons who should be willing to build houses or to repair houses, and the Court relied upon that to some extent in aid of the right of the remainder-man. The decision, however, seems to have proceeded principally on the broad proposition, that

(*a*) 15 Sim. 505. See Treatise, p. 144.

(*b*) 1 De Gex & Smale, 252.

if timber has been planted, or intentionally left standing, for ornament, the rule of the Court is to protect it.

In *Blagrave* v. *Blagrave* there was a singular provision in a will. The limitations were to the testator's wife for life, with several remainders for life, without impeachment of waste, with a proviso that neither the testator's wife nor any other person should mow any part of the park, or feed the same with other cattle except cows, sheep and deer. On an application for an injunction to restrain the tenant for life in possession from mowing, it was objected that the proviso was inconsistent with the estate. The Court granted the injunction, but with great reluctance (*c*).

It has been seen in the Treatise (*d*), referring to *Coffin* v. *Coffin* (*e*), that an injunction is not granted on the principle that it will do no harm to the defendant if he does not intend to commit the act complained of; nor will an injunction be sustained to prevent the defendant from removing works which it is clear the plaintiff had no right to erect, although it may be equally clear that such works are not injurious to the defendant or to any one else (*f*). In a subsequent case the same principle was followed. The defendants, a company, had erected certain works of a temporary and innocuous character, but without any power to erect such works. The Court suspended for a limited time an injunction of the negative mandatory class, which would in effect have compelled them to pull down the works, putting the company on an undertaking to do certain things, comprising all those things which their act required them to do for the convenience of the plaintiff (*g*).

But, on the other hand, if the injury has been committed, the party injured is not bound to accept the personal undertaking of the defendant that he will not continue the

(*c*) *Blagrave* v. *Blagrave*, 1 De Gex & Smale, 252.

(*d*) Page 147.

(*e*) Jac. 70.

(*f*) *London and Brighton Railway Company* v. *Cooper*, 2 Rail. Cas. 312.

(*g*) *Attorney-General* v. *Eastern Counties Railway Company*, 3 Rail. Cas. 337.

injury, but is entitled to the protection of an injunction. This was held in a case of *Geary* v. *Norton*(*h*), in which the defendant had pirated a registered article, and, on being apprised of his fault, and that a bill and affidavit had been prepared, offered to pay the costs already incurred, and to suspend the sale of any of the pirated articles of which he was the holder. The plaintiff, nevertheless, obtained an injunction, and the defendant not offering to pay the costs of the injunction, the suit was brought to a hearing. The Court held that the plaintiff was entitled to the protection of an injunction, and to the general costs of the suit. The defendant ought to have offered, after the injunction had been obtained, to pay the costs to that time, submitting to the injunction. It should be observed, that there was evidence to show that the defendant was informed, before formal notice was given to him, of the intention of the plaintiff to apply (*i*).

2. It is well settled, that a mortgagee is entitled to an injunction to restrain the mortgagor in possession from cutting timber, provided it is made to appear, on behalf of the plaintiff, that the land is an insufficient or *scanty security* without the timber (*k*). But it is obvious that, in the absence of authority, there might be as much doubt as to what is, in point of law, a *scanty security*, as upon any other question of mixed fact and law. In a recent case, however, a sort of rule was laid down as to what is meant by a sufficient security. It is not sufficient if the property is just equal to the mortgage debt and all expenses; but the proper question to be tried is, whether the property is sufficient in this sense, that the security is worth so much more than the money advanced, that the act of cutting timber is not to be considered as substantially impairing the value, which was the basis of the

(*h*) 1 De Gex & Smale, 9.

(*i*) See also *Losh* v. *Hague*, Webs. Pat. Cas. 200.

(*k*) *Hippesley* v. *Spencer*, 5 Madd. 422; and see the Treatise, p. 163.

contract between the parties at the time it was entered into (*l*). The affidavit in support of such a motion should state enough of the facts showing the value of the security, to enable the Court to judge for itself.

In a foreclosure suit, if after decree, the mortgagor, being in possession, commits waste, an injunction will be granted although the bill does not pray it (*m*).

3. Although generally a parson may not commit waste of any kind, and although generally it may be said that to convert pasture into plough land is waste, it is not every conversion of pasture into plough land that is waste, even on the part of a parson; and where it appeared that part of the glebe belonging to a rectory, which was ancient pasture, was intermixed with moss and weeds, and the defendant ploughed it up for the purpose of changing it and relaying it with grass, and swore that he believed the effect of his so proceeding would be to improve the land and increase the value of the rectory, Lord Langdale, M. R., refused to maintain an injunction. It is not to be collected from this case that wherever it may appear as the reasonable result of the evidence, that the ploughing up of ancient meadow will be for the benefit of the land, the Court would refuse to prevent the party in possession from so ploughing it up. The reasoning of the judgment shows, that it is only intended to apply to cases where the right of absolute ownership can never vest in any person, as in case of an ecclesiastical corporation; when, therefore, to hold the mere ploughing up of pasture or other conversion to be restrainable waste, without reference to its intended and probable effects, would be to impose upon lands held under such tenure the fetter of a permanent incapacity to be improved. "By the law," said his Lordship, "as admitted between lessor and lessee, or between tenant for life and remainder-man, very valuable improvements in agricul-

(*l*) *King* v. *Smith*, 2 Hare, 239. (*m*) *Goodman* v. *Kine*, 8 Beav. 379.

ture may be prevented during the temporary possession of a tenant, or a succession of tenants for years or for life. The time however comes when the fetters imposed by the contract or relation between the parties may be released; but if you apply the same law to the case of a parson's glebe, the course of husbandry and cultivation must remain the same in all time. What is once arable or pasture must always continue so, and no rector or vicar must employ any part of his glebe in any other manner than he found it employed, unless he can prove that it had been otherwise employed within some limited antecedent time. In a close which he cannot prove to have been employed otherwise than as meadow, he is not to plough, nor to make an orchard, nor to plant a bed of potatoes, however convenient or useful it might be for the parsonage that he should do so. He must do nothing which, as between landlord and lessee for years, the law has considered to be waste. No authority has been cited for so general a proposition, nor even upon the particular question, whether the Court ought to restrain the particular act now complained of; and the only case of which I am aware in which the Court has interfered to stay the conversion of glebe meadow into pasture is the case of *Hoskins* v. *Featherstone* (2 Br. C. C. 552), where the bill was filed not against the incumbent, but against the widow of an incumbent, who was doing the acts complained of during a vacancy(*n*)."

4. In a case of *Kingham* v. *Lee*(*o*) an attempt was made in argument to construe the decision in *Lord Ormond* v. *Kinnersley* (*p*) as meaning that a tenant for life with a condition not to commit or permit waste is completely a trustee, so that if he alienes, thereby enabling the alienee to commit a breach of the trust, he remains himself liable for such breach. The Court would not, however, accede to this.

(*n*) *Duke of St. Alban's* v. *Skipwith*, 8 Beav. 354.

(*o*) 15 Sim. 396.

(*p*) 5 Mad. 369; and see Treatise, p. 175.

"Where an estate for life," said Sir L. Shadwell, V.C.E., "is given subject to a condition or obligation not to commit or permit waste, the tenant for life has the same unrestricted power to vest the estate in any other person as he would have had if it had not been subject to any condition or obligation whatever; but this Court would of course interpose to prevent either him or his alienee from doing any act which would be a breach of the condition or obligation, and would make them, if they were living, or their assets, if they were dead, answerable for any benefit which they might have derived from such breach." Accordingly, in the case before the Court, it was held that where a woman, tenant for life with a condition against waste, married, and died leaving separate estate, and her husband had committed waste during the coverture, her separate estate could not be charged with the waste. The case was heard on demurrer, and the bill did not clearly allege that the feme tenant for life had separate estate, but the decision was pronounced on the assumption that the fact was well averred. With reference to the case of *Lord Ormond* v. *Kinnersley*, it is quite clear that all that Sir J. Leach meant was, that the condition was in the nature of a trust affecting the tenant for life whoever he might be, making him an owner coupled with a limited trust not to commit waste; not that it was a personal trust incapacitating the tenant for life from the right of alienation incident to his beneficial ownership. *Kingham* v. *Lee*, therefore, and *Lord Ormond* v. *Kinnersley* are perfectly consistent (*q*).

5. It has been decided, where a person domiciled abroad left personal estate both in the foreign country and in England, that his administratrix having taken out letters of administration in both countries, and being under a

(*q*) I make this observation because a hasty perusal of the marginal note of *Kingham* v. *Lee* might lead to the supposition that the doctrine of *Lord Ormond* v. *Kinnersley* is overruled by *Kingham* v. *Lee*, whereas it is explained, not overruled by that case.

bond to the foreign court properly to manage the English property, will not be restrained at the suit of a mortgagee in England of part of the foreign property, from transmitting the English personalty to the foreign country: the Court assumes that the foreign court will do justice (*r*).

On the question respecting interference with the personal estate of a testator or intestate pending litigation in the Ecclesiastical Court respecting the grant of probate or letters of administration, see *Connor* v. *Connor* (*s*) and *Newton* v. *Ricketts* (*t*), in addition to the cases cited in the Treatise (*u*).

6. As to who may apply for an injunction to protect a receiver against waste, it has been held that the application must be made by some person having an interest in the estate; the agent of such a party, without showing any authority from his principal, cannot make it, even though he is a party to the suit (*x*).

7. In a recent case (*y*), the V. C. Knight Bruce intimated that the protection afforded in equity in cases of mere trespass accompanied by destructive damage to property, is more largely afforded at this day than it was formerly. "I am not convinced," says that learned judge (p. 235 of the Report), "that where a man is in possession, however full and complete, of an estate by a title simply and merely adverse to that of another by whom the estate is, whether at law or in equity, claimed against him, without any privity between them, such a state of things, if the party in possession by his answer, whether truly or untruly, swear his title to be just and valid or that of his adversary to be unjust and invalid,—does of necessity prevent a court of equity from interfering (before any judgment at

(*r*) *Wallace* v. *Campbell*, 4 Y. & Coll. 167.
(*s*) 15 Sim. 598.
(*t*) 10 Beav. 525.
(*u*) Pp. 177, 178.
(*x*) *Hunter* v. *Nockholds*, 10 Jurist, 771.
(*y*) *Haigh* v. *Jaggar*, 2 Coll. C.C. 231.

law or decree in equity) to restrain the party in possession from stripping the estate of its timber, pulling down the mansion-house upon it, or other such acts. It is, I think, certainly true, that the Court of Chancery does not treat questions of destructive damage to property now exactly as it did forty or fifty years back; that its protection in such respects is more largely afforded than it then generally was."

Still, as to mere trespass, the jurisdiction is not extended. In a very recent case (*z*), where the plaintiffs and defendants were both railway companies, an injunction was asked which was in part to restrain the defendants from crossing the plaintiffs' line, and from using, for purposes alleged to be illegal, certain branch rails and a station which it was admitted they had a right to use for some purposes,—in effect, to restrain the defendants from committing trespass. Sir. J. Wigram, V. C., thus stated the doctrine,—"The jurisdiction of this Court to grant injunctions in cases of pure trespass is comparatively of modern establishment; but it is now clearly settled, that in cases of trespass under colour of title, where the mischief is irreparable, the jurisdiction of the Court exists; and I incline strongly to the opinion, that whether the mischief be irreparable or not, this Court ought by decree at least, if not upon motion, to extend and apply the jurisdiction of preventive justice to all cases of trespass in which, by analogy to cases of specific performance, damages would be an inadequate and uncertain remedy, and the protection of the right in issue the only mode of doing complete justice between the parties." In this case it was not shown that destruction or irreparable injury would accrue, and on that ground no injunction was granted.

Care must be taken, in applying this head of equitable jurisdiction, to distinguish cases of proper trespass from cases where the legal right is in dispute, and from those where the trespass is, as expressed in the above cited

(*z*) *The Union Railway Company* v. *Bolton and Preston Railway Company*, 3 Rail. Ca. 345.

case, under colour of title. Pure trespass is only where the plaintiff is in possession, for it is elementary that without possession a man cannot bring trespass though he has the freehold in law. Where the plaintiff is out of possession, and the person in possession claims title, that is matter of ejectment, not of trespass; and equity has not in any such case interfered till the title has been established at law. Where the question is, not whether the defendant has any right, but what is the extent of his right, that is what has been termed trespass under colour of title; and in cases of this class equity may interfere.

That the Court does not interfere against *waste*, when the plaintiff claiming title is out of possession, and the title is in dispute, appears as well by the case of *Jones* v. *Jones* (*a*), and the other cases referred to in the Treatise (*b*), as by a very recent case decided by the Vice-Chancellor Wigram (*c*). In that case the bill was filed by a person who, setting out a pedigree, alleged himself to be entitled to the inheritance, and that the defendant's ancestor, under *some pretended title unknown to the plaintiff*, got into possession nearly twenty years before, and died in 1845; and that the defendant thereupon, under such pretended title, entered into possession, and had continued and then was in possession, &c. The bill alleged that the plaintiff had not discovered his own title till within a very recent period; that the defendant threatened and intended to cut down ornamental and other timber and other trees, and to sell, and had marked trees for cutting, &c., and that *thereby irreparable injury would be done.* The defendant demurred. The Court said there was no case upon real estate where a party out of possession coming to the Court and complaining of another party in possession, and claiming a right to be in possession, has granted an injunction restraining the defendant from using the legal

(*a*) 3 Mer. 161.
(*b*) P. 188 *et seq.*
(*c*) *Davenport* v. *Davenport*, 7th March, 1849, MS.

rights claimed by him, until the actual right is declared at law. It was pressed on the part of the plaintiff, firstly, that the rule applied to personal property of various kinds, protecting it while the legal right is in course of determination, ought to be applied equally to the protection of real estate. 2ndly, That though the Court might refuse an injunction in such a case on interlocutory application, yet that was no reason for allowing a demurrer, because possibly at the hearing of the cause ground might exist for an injunction, and the bill ought therefore to be retained. But his Honor acquiescing in the observations of counsel as to the anomalous state of the law, considered the decision in *Jones* v. *Jones* applicable on both points, and allowed the demurrer.

It may be observed on this case and the case of *Jones* v. *Jones*, and the doctrines involved in them, that perhaps there is not ground for saying that the law is in an anomalous state. The principle of the interference of equity by injunction is, throughout, never to interfere against an apparent legal right, or claim of legal right, except where the result of non-interference will be, in the apprehension of the Court, destructive of the whole or a part of the plaintiff's property, if it turns out that he has the legal right. Equity interferes on this ground more freely in regard to personal property, for the simple reason that personal property is more susceptible of total destruction than real property. If a defendant has possession of a chattel, or of stock, or is in the exercise of a patent right or other incorporeal right, to refuse an injunction may be, under circumstances, to determine in effect the right on motion, by permitting the destruction or total removal of the subject-matter of it. But it is otherwise with regard to land; and the true principle of the decisions in *Jones* v. *Jones*, and *Davenport* v. *Davenport*, is, I apprehend, that timber is not in law a part, but only a fruit of the inheritance. Cutting it does not cause what the law holds destruction of, or irremediable injury to, the property in

dispute; and hence, if for no other reason, an injunction cannot be granted. Whether, if a plaintiff swears to a positive title, the defendant would or not be restrained from committing *destruction*, such as digging up the substance of the inheritance, on the mere ground of his possession, has, I believe, never been decided. All the cases in which the Court has actually refused to interfere, have been cases of *waste* not being in legal language *destructive* (*d*). In *Davenport* v. *Davenport* the bill alleged, it is true, that irremediable mischief would ensue, but it is obvious that if the law does not, as it clearly does not, consider cutting timber to be irremediable mischief, alleging it to be so, will not have the effect of making it so on demurrer. It is to be observed that *Fingal* v. *Blake* (*e*), in which an heir at law in possession was restrained, was not cited in *Davenport* v. *Davenport*.

8. On this, some late cases have been decided confirmatory of the doctrine of the older cases. Thus where a party filed his bill for an injunction, and moved, and the motion stood over, and was not brought on again for a twelvemonth, the Lord Chancellor said an immediate injunction could only be granted on the ground that, to wait for the decree, would be productive of great or unknown mischief to the plaintiff; that if a complainant makes his application to the Court, and allows it to slumber, the Court will not interpose in his favour when he shows by his own conduct that he does not consider such interference to be imperative; and refused the motion (*f*).

(*d*) In *Jones* v. *Jones* the bill prayed an injunction against destruction; but it does not appear by the report what were the acts done or intended. In *Smith* v. *Collyer* (8 Ves. 89) the act was cutting timber.

(*e*) 2 Mol. 542; and see the Treatise, p. 189.

(*f*) *Pickford* v. *Grand Junction Railway Company*, 3 Rail. Cas. 538; see also *Powell* v. *Thomas*, 6 Hare, 300; *Haines* v. *Taylor*, 2 Phil. 209.

CHAPTER II.

Injunctions to restrain Infringement of Copyright.

1. THE late Copyright Act, 5 & 6 Vict. c. 45, repeals the 8 Ann. cap. 19, the 41 Geo. III. c. 107, and the 54 Geo. III. c. 156. It defines *copyright* to mean the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the word is applied in the act. It defines *book* to mean and include every volume, part, or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart or plan, separately published; and *dramatic piece* to mean and include every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment. It does not, however, introduce any *general* alteration which would have the effect of rendering useless the learning of the cases decided before the statute.

It has been stated in the Treatise (*a*), that to support an injunction in cases of copyright, a *primâ facie* legal title must be shown. This expression is perhaps somewhat inaccurate; what must be shown, is a *primâ facie* legal title,

(*a*) P. 192.

or an equity to have one. Formerly, it would seem, a legal title was required; but, since the case of *Mawman* v. *Tegg* (*b*), a different doctrine has been acted on, and, in addition to the cases referred to in the Treatise (*c*), may be mentioned *Chappel* v. *Purday* (*d*), and *Bohn* v. *Bogue* (*e*), There seems nothing in the 5 & 6 Vict. c. 45, to alter the practice laid down by these cases. However, the practice of putting the defendant on terms to admit at law the legal title of the plaintiff, is only applicable where the question for a court of law is not the plaintiff's title generally, but the fact of infringement or no infringement. Where the plaintiff is put or left to establish his title generally in an action, the defendant cannot be called upon to make any admissions. The whole affirmative of the issue is upon the plaintiff (*f*).

If the copyright claimed is by assignment under the 8 Ann. c. 19, the assignment, to be good at law, must be not only in writing, but attested by two witnesses (*g*).

The 5 & 6 Vict. c. 45, s. 18, has introduced a new species of title to copyright, viz. that acquired by employing and paying persons for writing in periodical works. The essential circumstance necessary to the creation of this species of copyright seems to be, that the writer shall be specifically employed to compose the contribution to the periodical, and that the contribution shall be composed under such employment on the terms that the copyright shall belong to the employer, and be paid for by him. It has been doubted whether, when the publishers of a periodical pay an editor generally for compiling the periodical, and the editor employs and pays the writer of particular articles, the copyright in such writings is in the publisher, within the 5 & 6 Vict. c. 45 (*h*).

(*b*) 2 Russ. 385, referred to on this point in the Treatise, pp. 196, 197.

(*c*) P. 197.

(*d*) 4 Yo. & Col. Eq. Exch. 485.

(*e*) 10 Jurist, 420.

(*f*) *Duke of Beaufort* v. *Morris*, 2 Phil. 683; and see the observations of Lord Cottenham in *Elderton* v. *Lack*, 2 Phil. 683.

(*g*) *Davidson* v. *Bohn*, 12 Jurist, 922.

(*h*) *Brown* v. *Cooke*, 11 Jurist, 77.

It must be observed also, that by the 24th sect. of the 5 & 6 Vict. c. 45, no proprietor of copyright in any book which shall be first published after the passing of the act can proceed at law or in equity in respect of any infringement, without having first made an entry in the book of the registrar of the Stationers' Company pursuant to the act. (See sections 13 and 19.) So that an injunction bill to restrain infringement of copyright under the 5 & 6 Vict. c. 45, should aver that registration has been duly made.

2. With reference to the jurisdiction exercised in *Byron* v. *Johnstone* (*i*), to restrain the publication of a work in the name of an author, when there is strong ground to believe it is not that author's work, it must be observed, that the principle of that jurisdiction is, that a work shall not be published in the name of a person who repudiates it; or, as a more general proposition, that a fraudulent use shall not be made of another's name, affecting his rights of property; but, to lay the ground for this interposition of equity, it is requisite that the plaintiff shall be in the habit of doing the thing that the defendant represents him to be doing; for if he is not, he is not damnified in his property. Therefore, where an eminent physician, who was not in the habit of making medicines for sale, filed his bill for an injunction to restrain A. from vending certain pills, which he represented as the plaintiff's, so as to hold out that they were compounded by and sold on behalf of the plaintiff, the Court refused an injunction. The Court held that the case was defamation, if any thing; that equity could not determine whether it was so or not; and that it could not be considered at all made out, that the act of the defendant could be any injury to the property of the plaintiff (*k*). The decision is at least singular, and seems founded on an exaggerated idea of the impregnability of a high professional

(*i*) 2 Mer. 29; and see Treatise, p. 195.

(*k*) *Clark* v. *Freeman*, 12 Jurist, 149.

reputation. That the act of the defendant amounted to a fraudulent use of the plaintiff's name, cannot be doubted. Neither can there be much doubt that the plaintiff might be injured in reference to property by such fraudulent act, since it is tolerably clear, that if the public believed the pills were compounded by the plaintiff, they would or might be induced to buy the pills instead of consulting him. In *Millington* v. *Fox* (*l*), the Court held that there is a title in trade marks, independently of fraud; and if that is so, surely there is in every one a title in his *name*, independently of fraud. At any rate it is perfectly clear, that a fraudulent adoption by one *trader* of the name, or style, or trade mark of another; any fraudulent representation, in fact, leading the public to suppose that they are dealing with another, will not be permitted, on the ground of its being a fraud on the party and the public. And it may be thought that there is no distinction as to fraud of that double kind, between the fraudulent use of a tradesman's name or mark, whereby the public buys from another, intending to buy from and believing they are buying from him; and the fraudulent use of the name of an eminent professional man, whereby the public buys something, believing it to be his production, the result of which buying and belief may be, as to the individual, either by actual loss of business, or by injury to his reputation, to contract the professional employment given to him by the public. That such use of an eminent man's name is a fraud on the public, is clear.

3. (*m*) The doctrine that it is value and not quantity of matter pirated that influences the Court, was acted upon in *Bohn* v. *Bogue* (*n*), although the defendant had taken a very small portion of the plaintiff's work; yet as his own statement gathered from his preface was, that what he had

(*l*) 3 Myl. & C. 338; see Treat. 232. (*n*) Cited *supra*, p. 33.
(*m*) See p. 197 *et seq.* of the Treat.

rejected was worthless, so that in effect he had taken the very marrow of the plaintiff's work, an injunction was granted. So in another case (*Campbell* v. *Scott*) (*o*), which was a case of alleged infringement by printing whole passages from the plaintiff's book, the taking of the plaintiff's compositions by the defendant was admitted; the defence was, that the matter taken from the plaintiff was trivial in quantity, and that it was used by way of illustration, and could not injure the plaintiff's sale. The Court thought it was not used merely by way of illustration, but formed part of the *substratum* of the defendant's work; and, as to the question of *damnum*, it was held that where there was clearly *injuria*, the *damnum* was matter of which the plaintiff was to judge, and an injunction was granted.

When it is said that a *bonâ fide* abridgment (*p*) will not be restrained, it must be understood that abridgment is not merely eliminating passages from another man's work, but that use of it which, in the fair exercise of a mental operation, deserves the character of an original work (*q*).

In *Dickens* v. *Lee* the plaintiff's work was an imaginative tale; the defendant had taken the fable, the characters, the incidents, the names, and even the style of language. It is to be gathered from the report, that thus using all the plaintiff's materials, he had told the story in a shorter manner, and he relied upon abridgment as his defence; but the Court held that such an abridgment was not an exercise of mental labour deserving the character of an original work, and maintained an injunction, putting the plaintiff to establish his right at law, if the defendant desired it.

4. The decisions on this head (*r*) proceed more on the ground of fraud than of invasion of property; to this prin-

(*o*) 11 Sim. 31.

(*p*) See p. 199 of the Treatise.

(*q*) *Wilkins* v. *Aitkin*, 17 Ves. 422; and *Dickens* v. *Lee*, 8 Jurist, 183.

(*r*) See p. 203 of the Treatise.

ciple may be referred the case of *Seeley* v. *Fisher* (*s*), where an injunction was granted to restrain A. from putting forth his work under advertisements which the Court below thought tended to produce the impression, contrary to the truth, that it contained matter which was in fact the property of B. But if there be no such fraudulent misrepresentation, but only statements which, whether true or false, tend merely to encourage a belief that the matter contained in A.'s work is the truly valuable matter, and that contained in B.'s is spurious and of no value, an injunction will not be granted to restrain such representations; and, on the ground that such was the true effect of the advertisements, the Lord Chancellor dissolved the injunction.

5. To the cases referred to in the Treatise (*t*) on this subject may be added the recent case of *Palin* v. *Gathercole* (*u*). In that case the point decided as to the right of the receiver of letters to publish them was this, that he will not be permitted to publish them for the purpose of representing to the public as true, that which he has, in legal proceedings upon that very question, admitted to be false. The circumstances of that case were these:—Palin, the plaintiff, had written to Gathercole, the defendant, who was the editor of a newspaper, certain letters, containing information respecting one Nokes, and Gathercole, from these letters, drew up an article which he published in his newspaper. Nokes brought an action against him for libel, and he compromised the action, paying Nokes' costs, and apologizing. Gathercole then claimed of Palin half the costs that he, Gathercole, had so incurred, and Palin refusing to pay them, Gathercole published in his newspaper a statement that the libel upon Nokes was communicated to him, Gathercole, by Palin. Palin there-

(*s*) 11 Sim. 581.
(*t*) See p. 206 *et seq.* of Treatise.
(*u*) 1 Coll. 565.

upon brought an action against Gathercole, and Gathercole pleaded that the matter, however libellous as between Nokes and Gathercole, was matter of which, as between Palin and Gathercole, Palin was the author; but before trial Gathercole submitted to what was in effect a general verdict, establishing in substance, as his Honor the V. C. Knight Bruce expressed it in his judgment, that the libel published by Gathercole of Nokes was not a libel which Palin had communicated to Gathercole. Gathercole then proceeded to show Palin's letters to third persons, upon which Palin filed his bill for an injunction to restrain Gathercole from publishing or showing the letters, and obtained an *ex parte* injunction. The use which Gathercole desired to make of the letters was, it will be observed, to establish the fact that Palin was the author of the libel upon Nokes, the very fact which he had, by submitting to the general verdict in Palin's action, admitted not to exist. Under these circumstances the Court refused to dissolve the injunction, permitting, however, the defendant to exhibit the letters to his solicitors and counsel in the cause.

6. These cases rest upon the principle of property, in the sense of one's exclusive right to the use of his own production, in any way except by making it the subject of *copyright*, strictly so called (*v*).

The recent case of *Attorney-General* v. *Strange* raised this question, whether on the ground of property, apart from all question of fraud, a person composing etchings can restrain another, who, without his consent, has obtained copies of such etchings, from publishing a catalogue of them; and it was held by the Vice-Chancellor Knight Bruce (*w*), and afterwards on appeal by the Lord Chancellor (*x*), that he can.

On this point Lord Cottenham said, " it being admitted

(*v*) See p. 209 of the Treatise.
(*w*) 13 Jurist, 45.
(*x*) 13 Jurist, 109.

that the defendant could not publish a copy, that is, an impression of the etchings, how on principle does the case of a catalogue, list, or description, differ? A copy or impression of the etchings could only be a means of communicating knowledge and information of the original; and does not a list and description do the same? The means are different, but the object and effect are similar. It is to make known to the public more or less the unpublished works and compositions of the author, which he is entitled to keep wholly for his private use and pleasure, and to withhold altogether, or so far as he may please, from the knowledge of others."

7. A species of copyright is given in designs for *ornamenting* certain manufactures, and for designs having reference to some purpose of *utility* for the *shape or configuration* of manufactures, by the 5 & 6 Vict. 100, and 6 & 7 Vict. c. 65.

The 3rd section of the first statute gives to the proprietor of any design within the meaning of the act, the sole right to *apply* such design to any article for a limited time. The 7th section enacts, that no person shall *apply* any such design, or any fraudulent imitation thereof, *for the purpose of sale*, without the licence in writing of the proprietor. It has been determined, that the general language of the entitling section, the 3rd, is not cut down by that of the 7th, and that an injunction will be granted to restrain a person from *applying* the plaintiff's design to any article during the term of the copyright, though he does not sell such article, and does not intend to sell it during the term (*y*).

8. The point discussed in the Treatise (*z*) in reference to *D'Almaine* v. *Boosey* (*a*) has been conclusively settled

(*y*) M'Crea v. *Holdsworth*, 12 Jurist, 820.

(*z*) P. 216.

(*a*) 1 Y. & Col. 288.

by a late case (*b*), in which it was laid down by the whole Court of Common Pleas, that an alien friend, the author of a work, of which he is also the first publisher in England, and which has not been made *publici juris* by a previous publication elsewhere, has a copyright in that work, whether it be composed in this country or not, and that such copyright is not defeated by a *cotemporaneous* publication abroad.

9. Under the 5 & 6 Vict. c. 115, the author of any dramatic piece of music has the sole liberty of representing or performing it generally, that is, anywhere, and not as in the case of ordinary dramatic works, only at some *places of dramatic entertainment;* and therefore the author of a song, and of the music to which it is set, will be protected by injunction against its being publicly performed, sung or recited generally (*c*).

(*b*) *Cocks* v. *Purday*, 12 Jurist, 677. (*c*) *Russell* v. *Smith*, 15 Sim. 181.

CHAPTER III.

Injunctions to restrain the Infringement of Patents.

1. *Distinction as to when the Court will interfere and when not.*
2. *When a Party does not move within a reasonable Time of filing the Bill.*
3. *Where the Equity appears only by the Answer.*
4. *What Affidavit requisite to support Application, and when Motion is on Notice.*
5. *Of granting Inspection.*

ALTHOUGH a verdict has been obtained by a patentee, yet if it is subject to a bill of exceptions properly tendered, the Court will not in general consider the trial complete, and will not grant an injunction till the bill of exceptions is disposed of (*a*). And although a patent may have been the subject of several actions, in all of which the novelty and utility of the invention have been put in issue, and verdicts have been for the patentee, yet if on a bill filed by him against another person, the defendant's case is, that his alleged infringement is quite different from those which were in issue in the actions, an injunction will not be granted pending the trial of the right, merely on the ground of the plaintiff having succeeded in the actions (*b*).

(*a*) *Bridson* v. *M'Alpine*, 8 Beav. 229.

(*b*) *Crosskill* v. *Every*, Rolls, January 20, 1848, MS.; and see a report of this case in 10 Law Times, p. 459, which somewhat overstates the effect of the decision. The writer was counsel in the case of *Crosskill* v. *Every*, and is able to state from personal recollection, the point, and the only point, which was actually decided. The defendant's case, in support of which he tendered evidence, was, that the machine made by him differed very much from those made by the defendants in the cases in which the plaintiff had recovered verdicts at law. The question of fact, therefore, between him and the plaintiff was quite distinct from that in the cases in which ver-

In *Bridson* v. *Benecke* (*c*) the Master of the Rolls again laid it down that a verdict in an action between A. and B. is not conclusive for the purpose of granting an injunction pending the trial of the right in a suit for an injunction between A. and C.; but the Court will give great weight to it, especially so far as the points raised between A. and C. are the same as those determined between A. and B.

As to the effect of laches in a plaintiff who has obtained an injunction on the terms of speedily trying the right, the following case has recently been decided.

An injunction was granted at the end of Michaelmas term, on the terms of the plaintiff bringing his action at the sittings after that term, and it was in the paper for trial in February, but the plaintiff postponed it on account of the absence of his leading counsel, and afterwards again postponed it because there was not a sufficient number of special jurymen present, so that the action had not been tried on the 29th of July. The Court held that the injunction was not to be sustained because the plaintiff, for his own convenience, had neglected to go to a speedy trial, and dissolved it (*d*).

It has been stated in the Treatise (*e*) that it would be perceived from the cases there referred to, that wherever there is any considerable doubt as to the validity of a patent at law, an injunction is either not granted at all, or is only granted on terms, in order to prevent irreparable damage before the title can be tried at law.

The application of this principle to each particular case will however depend on the circumstances of the case; and in considering whether an injunction will be granted or refused in the first instance, pending the determination of the legal right, it must be considered whether irreparable or great injury will have been done to the de-

dicts had been given; and on this ground it was that the Court intimated that the verdicts would not entitle the plaintiff, as a matter of course, to an injunction.

(*c*) Rolls, February 9, 1849. MS.

(*d*) *Stevens* v. *Keating*, 2 Phill. 333.

(*e*) Page 223.

fendant by the injunction, should the plaintiff's legal right fail; or to the plaintiff by refusing it, should he turn out to have a legal right. Generally it may be said, that unless the plaintiff's legal right is clear, the Court will not at this day grant an injunction while the legal right is in course of trial (*f*).

It has been also stated in the Treatise (*g*), that in the case of *Bacon* v. *Jones*, Lord Cottenham had observed that he never had granted, and probably never would grant, an injunction to restrain infringement of a patent without putting the plaintiff to try the right at law, if the defendant desired it. This point has been since much discussed. In a case of *Wilson* v. *Tindal* (*h*), Lord Langdale, M. R., said, arguendo, he had no doubt of the competency of the Court to grant an injunction simpliciter; that it was not the right of parties in every case to have an action tried in a court of law; that it is a question of convenience, and that the Court is to exercise a fair discretion. However, in *Harman* v. *Jones* (*i*), Lord Cottenham held that where the legal right is in contest, it is the duty of the Court, in granting an injunction, to put the legal question in a course of immediate investigation, whether that be asked for or not; and an injunction simply, without a direction to the plaintiff to bring an action, or without some direction for the trial of the legal right, will, on the ground of that omission only, be varied. So if an injunction is refused, the order is not correct if it does not contain some direction enabling the parties to proceed at law (*k*). And where the injunction is to restrain a party from enforcing a legal right, the Court ought not to grant it without securing to itself the means of putting him in the same position, in the event of his turning out to be right, as if the Court had not interfered (*l*).

(*f*) *Spottiswoode* v. *Clarke*, 2 Phil. 154.

(*g*) Page 224.

(*h*) Webs. Pat. Cas. 730.

(*i*) 1 Cr. & Phil. 299.

(*k*) *Swallow* v. *Wallingford*, 12 Jurist, 403.

(*l*) *Sancster* v. *Foster*, 1 Cr. & Phil. 302.

From these cases, and from the doctrine so frequently laid down by Lord Cottenham, that the Court is not in matters of injunction to try a legal right, it seems to follow, that the dictum in *Wilson* v. *Tindal* cannot be supported, and that it is of right in the parties to have a trial at law of some kind of the legal right.

2. On the question, what the Court will do at the hearing, where a party files a bill praying an injunction, and does not move within a reasonable time after filing the bill for an interlocutory injunction (*m*), some important distinctions have been taken in recent cases. Where in a case upon the right to a trade mark, these circumstances existed, but at the hearing, though the plaintiff did not establish by the evidence his right to the injunction, the evidence showed that the defendants had at least acted so that the public might think they were buying the plaintiff's goods, the Court offered to the plaintiffs to retain the bill, if they would waive all account and pay the costs of the evidence; and if they refused that, then it offered to the defendants to dismiss the bill *without costs*, or to retain the bill with liberty to bring an action (*n*). But if a plaintiff has obtained an injunction on filing, or within a reasonable time of filing the bill, without being put to establish his right at law, and the cause goes on to a hearing, and at the hearing the defendants still contend that they have a right to do the acts complained of, the Court will not dismiss the bill, but will retain it for a time, with liberty for the plaintiff to bring an action (*o*). And here it may be observed, that a plaintiff whose right to equitable assistance depends on the legal right, may move at once for leave to try the legal right, without asking for an injunction, if the answer denies the legal right (*p*).

(*m*) See p. 224 of the Treatise.

(*n*) *Rodgers* v. *Nowill*, 6 Hare, 325.

(*o*) *Duke of Beaufort* v. *Morris*, 6 Hare, 340; and *Ward* v. *Key*, 10 Jurist, 792.

(*p*) *Rodgers* v. *Powell*, 6 Hare, 332.

3. A point similar to that raised in *Curtis* v. *Cutts* (*q*) was decided in a very recent case (*r*), where the Vice-Chancellor of England held that a common injunction could not be maintained where the answer denied all the plaintiff's case, but made by other allegations a case, on which, if the plaintiff had made them, he would have had an equity for an injunction. *Curtis* v. *Cutts* was not cited in this case (*s*).

4. (*t*) Whether, to support an application for an injunction made upon notice, an affidavit is necessary that the plaintiff *believes* himself the true inventor at the time of making the application, cannot be considered as settled by decision, and may be doubted. In *Hill* v. *Thompson* (*u*) Lord Eldon was not only dealing with an *ex parte* application, but expressly confined his remarks to such an application. In *Sturz* v. *De la Rue* (*v*) Lord Lyndhurst's expression is general (*w*); but he was dealing with an *ex parte* application, and it is submitted that his decision must be construed with reference to the subject-matter of it. In a case of *Neilson* v. *Thompson* (*x*) the very point occurred, and was raised in argument; and although the affidavit did not go to the belief of the patentee at the time of making the application, the injunction was granted. Great weight cannot, however, be attributed to this decision, because it does not appear that the attention of the Court was expressly directed to the point at the time of giving judgment.

It is submitted that the reasons for such an affidavit in support of a motion *ex parte*, fail altogether on a motion

(*q*) See the Treatise, p. 224; 8 Law Journ. 184.

(*r*) *Creasy* v. *Beavan*, 14 Sim. 99.

(*s*) I think it right to apprise the learned reader that I have been informed by one of the learned reporters who conducted the authorized reports in Lord Cottenham's Court when *Cutts* v. *Curtis* was decided, that they were not satisfied that Lord Cottenham expressed himself to the effect attributed to him in the report in the Law Journal.

(*t*) See p. 226 of the Treatise.

(*u*) 3 Mer. 622.

(*v*) 5 Russ. 322.

(*x*) 1 Web. Pat. Cas. 276, n. (*a*).

made upon notice. On an *ex parte* motion the Court has before it only the applicant, and granting, if at all, only on the ground of pressing danger, an order, which may be highly prejudicial to the defendant, requires all the evidence that can be *primâ facie* obtained in support of the justice of the claim. It would be, indeed, a strong thing to give to one party an injunction against another behind his back, without putting the applicant to pledge his own belief to the truth of those facts which support his title; for the Court has on such an occasion no means of knowing whether there is not to the plaintiff's title, the objection of want of novelty, except by the plaintiff's own statement. But when the motion is made on notice, the plaintiff and defendant are at arms-length. The plaintiff produces the patent, which shows *primâ facie* his legal title. That legal title may be invalidated by some matter of fact; but if it is, is it not for the defendant to show that there is such a defect? The plaintiff's belief of the novelty of the invention is merely evidence, and may be well or ill founded; and the validity of his title is only so far affected by it as it is evidence. Suppose, for instance, that a patentee plaintiff swore that he believed the invention not to be new, stating as the ground of his belief that A. had invented the same thing before the date of the patent; and suppose that before the motion comes on, he discovers from A., and A. files an affidavit to prove the fact that the plaintiff was mistaken in the date of A.'s invention, and that A. had not made it till after the grant of the patent. Can there be any doubt that if the Court believed A., the plaintiff's unfounded belief would be no evidence against the validity of his title? No doubt if a plaintiff alleged on his bill that he believed the invention not to be new, he would state himself out of Court, not because his so believing, of itself invalidates the patent, but because the Court would believe against the party, as matter of evidence, what he himself believed. But to *require* a plaintiff, on an application for an injunction, which admits evidence

on the part of the defendant, to swear that he believes the invention new, or in default to refuse an injunction, appears to the writer to be presuming the invalidity of a *primâ facie* legal title; and in effect requiring proof of a negative, by calling upon the party showing such legal title, to prove that it is not bad, instead of throwing on the party contesting its validity, the onus of proof that it is bad.

5. Before concluding this subject, it will be proper to refer to the practice of ordering inspection in aid of a trial of the legal right. Where a court of equity, on a motion for or to dissolve an injunction, has thought it necessary to send the case to be tried at law, it has sometimes, under circumstances, put one and sometimes each of the parties upon terms to show his premises and machinery to the other party or his agents. This was done in the cases of *Russell* v. *Cowley* (*y*) and *Morgan* v. *Seaward* (*z*). In *Russell* v. *Cowley* the order made upon the motion of the plaintiff for an injunction, and affidavits read on both sides, was, that the plaintiff should be at liberty to bring such action as he should be advised, and an account to be kept; and that the defendant should *permit and suffer* the plaintiff's solicitor, and certain witnesses named in the order, to inspect the premises and machinery of the defendant; and the defendant was to set his machinery to work in presence of such persons, and the defendant was to have a like liberty; the object of the Court, expressed in the order, being to afford the plaintiff and defendant respectively the means of giving such evidence to the Court and jury on the trial at law as should show the fact of infringement or no infringement (*a*). It appears by Mr. Webster's report that the order was by consent; that, however, does not appear upon the order itself.

In *Morgan* v. *Seaward*, which was heard on motion to dissolve an injunction obtained by the plaintiff, the evi-

(*y*) Webs. Pat. Cas. 457.
(*z*) *Ibid.* 167.
(*a*) Reg. Lib. 1832, fol. 2250.

dence was very voluminous and conflicting; but the principal point to be determined was, whether the machinery used by defendants to give a particular movement to a paddle-wheel, was substantially the same combination as the machinery used by plaintiff. The Court being unable, from the evidence before it, to determine the point, dissolved the injunction, directing that plaintiffs should be at liberty to bring such action as they might be advised, and in the meantime an account to be kept; and the plaintiffs were to have liberty, at reasonable times, for themselves and their scientific witnesses to inspect the paddle-wheels made by the defendant (*b*). The order in this case was not by arrangement. Whether any opposition was made to the inspection does not appear by the report. It is to be presumed that none was offered.

The case cited usually as an authority for this practice is *Brown* v. *Moore*, a note of which is to be found in 3 Bligh's Appeal Cases, 178; but it is not clear that any such order was made in that case.

In 3 Swanston, p. 264, n. (*a*), *Brown* v. *Moore* is mentioned with a note, that "no entry of it occurs in the registrar's book."

All, in fact, that can safely be collected from the case of *Brown* v. *Moore* is, that *an inspection* had taken place; but it does not appear clear whether that inspection was or was not under an order of the Court, and if it was, what were the circumstances under which the order was made.

The question, how far the Court will go in compelling a party to submit to inspection of his premises, and on what its authority to do so is grounded, was much discussed in *Kynaston* v. *The East India Company* (*c*), and *East India Company* v. *Kynaston* (*d*). In that case the plaintiff claimed tithe of certain houses, warehouses, and wharfs,

(*b*) Reg. Lib. 1834, fol. 1095.
(*c*) 3 Swanst. 248.
(*d*) 3 Bligh's Appeal Cases, 153.

in the occupation of the defendants, in the city of London. The cause was heard at the Rolls in March, 1818, when his Honor the Master of the Rolls declared that the plaintiff was entitled to tithes after the rate of 2*s.* 9*d.* in the pound upon the annual value of certain of the premises, and ordered a reference to the Master to ascertain the value of such premises. Afterwards the plaintiff moved before the Vice-Chancellor, that certain persons, named Joseph Sill and Robert Smith, might be at liberty to inspect the defendants' premises preparatory to their being examined as witnesses upon interrogatories for proving their value, whereupon his Honor made an order, referring it to the Master to inquire whether such inspection was necessary, and the Master reported that such inspection was necessary. From this order the defendants appealed to the Lord Chancellor, who, after hearing the arguments, said, "The question is, whether the Vice-Chancellor was right in taking a step which leads to giving liberty, if the Master should think it necessary, to the plaintiff to appoint persons to examine the warehouses. On the Master's report, the propriety of the order cannot be questioned. It may be right that the terms of the order should be altered, directing, not that witnesses shall be at liberty, but that the East India Company shall give them liberty to inspect; and then comes the question, whether this Court has authority to make an order on the defendants to give such liberty. I have found no case in point; but, on principle, I think that the Court has authority. It has been admitted on all sides, that where houses and warehouses in London have never been let, tithes are to be paid according to the rent which they are worth to be let at. Some of the old cases say that there is no authority in the statute for charging those houses at all, but it was admitted at the bar that the point is now decided; and I must take it, that if a person has property of the various descriptions enumerated not let, the tithe-owner, whether lay or ecclesiastical, is entitled to 2*s.* 9*d.*

in the pound, not on the rent, for there is none, but on the value, that is, the value at which it might be let. Under that act this Court has undoubted jurisdiction to entertain the suit; that point, though formerly questioned, is now settled by many decisions. Having jurisdiction, the Court must in course direct an account of tithes, by directing an account of what is the value of the premises to be let; and the question is, whether, in such a case, the Court must not have the means of ascertaining by the inspection of witnesses the nature of the premises, in order to ascertain their value; and whether the law meant to leave it thus, that the defendants were to state in their answer their opinion, and to send their own surveyor to give his opinion of the value; but, on the other hand, the plaintiff was to be in such circumstances, that he could examine no witnesses who knew with precision the value of the premises. It is obvious that the capacity of warehouses, of equal external dimensions, for holding goods, might be greater or less, and that the rent would be higher or lower, according to the capacity and accommodation of a warehouse. It is admitted, that where a man has a right to receive a certain sum in the pound on the value of trees, the Court has ordered inspection of the trees; so in the case of a commission on diamonds, inspection would be ordered of the diamonds. I remember a case where, on a suggestion that a machine used by the defendant was an infringement of a patent, the Court ordered the defendant to allow an entry into his premises for the purpose of ascertaining, by inspection, whether the machine was an infringement (*b*). So, in the instance of partition of a house, the tenant having a right to the exclusive possession of it during a term, on a bill for partition, the Court would order an entry for the purpose of determining in what manner the house could be divided, or what must be paid for owelty of partition.

" But it is said that in these cases the parties had an interest in the property, or an interest under a contract. I

(*b*) The case alluded to by the Lord Chancellor is supposed to be *Brown* v. *Moore*.

say that this parliamentary contract is on the same ground, because every person claiming under it has an interest in the premises; and if, without this proceeding, the Court must miscarry, and cannot attain the justice of the case without inspection, my opinion is, that on principle it has authority to order inspection, taking care to impose as little inconvenience as possible on those on whom the order is made.

" Cases relative to the production of deeds and papers are not applicable, because there is a particular right to call for the production of those deeds; but on these general principles the Court must make the order."

Afterwards the Vice-Chancellor confirmed the Master's report, and ordered that the defendants should *permit* Joseph Sills and Robert Smith to inspect the several warehouses, &c., preparatory to their being examined as witnesses upon interrogatories. From this order also the defendants appealed to the Lord Chancellor, who, on the 4th May following, ordered that both the orders made by the Vice-Chancellor should be affirmed.

On appeal to the House of Lords the three orders were confirmed. Lord Redesdale, in delivering his opinion, made a distinction between an order directing a *forcible entry* to inspect, and an order on the defendant directing him to *permit inspection*, and seemed to doubt whether the Court would make an order for forcible entry. He said, " Courts of equity proceed always indirectly, by process of contempt, in all cases except where the decision is upon a title to land, in which excepted case they decree possession, and direct the sheriff to execute the decree." And further, " in case of chattels, they frequently order specific delivery of the article demanded, but enforce their decrees and orders only by process of contempt. In such cases courts of equity enforce obedience by process of contempt, and never, but in the excepted case of a decree for land in a judgment upon title, direct the sheriff to take and give possession by force."

The Lord Chancellor, however, intimated, that the Court might not be bound within those limits. He said, "If the defendants refuse to *permit* inspection, the Court will then have to consider what ought to be done, whether they will compel the inspection, and how. No such order has yet been made, but the Court can find the way to do complete justice."

In cases of injunctions to restrain the working of mines, the practice of the Courts of Equity of ordering inspection is well settled (*c*).

The cases seem, on the whole, to justify the following conclusion: that in questions as to the infringement of patents, a Court of Equity will make an order in substance compelling the defendant to submit to inspection of his premises and machinery, where the evidence before the Court is sufficient to raise a strong presumption of the fact of infringement, and where it appears to the Court that without such inspection satisfactory evidence cannot be obtained; provided, in the words of Lord Eldon, the Court must miscarry, and the justice of the case cannot be obtained without it. And therefore, if a case were to arise, in which the preponderance of evidence in favor of the presumption of infringement were to be slight, and it could be shown that irreparable or great injury might be done to the defendant by the inspection, if the fact should turn out that there was no infringement, it may be well doubted, upon the authority of the cases cited, whether the Court would made the order (*d*).

(*c*) *Lord Lonsdale* v. *Curwen*, and *Walker* v. *Fletcher*, 3 Bligh's App. Cas. note, 168 to 178. In the former of these cases the order was, that the plaintiff should *be at liberty* to inspect defendant's workings, and not merely that the defendant should *permit* inspection; and in *Walker* v. *Fletcher* the terms of the order were similar, but in that case the liberty to inspect was reciprocal.

(*d*) It is perfectly obvious, that if the defendant's case were that he was using an invention of his own, irreparable injury to him might be caused by an inspection, if it should turn out that there was no infringement.

CHAPTER IV.

Injunctions to restrain the Use of another's Name or Designation, and the Imitation of Trade Marks.

THE principle upon which injunctions are granted to restrain the imitation of trade marks (*a*), long exclusively used by a particular trader, so as to connect his name or trading concern with the reputation acquired in the market by the goods bearing the particular mark, is thus expressed by Lord Langdale in *Perry* v. *Truefitt* (*b*), "I think that the principle on which both the courts of law and equity proceed in granting relief and protection in cases of this sort is very well understood. A man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practise such a deception, nor to use the means which contribute to that end. He cannot, therefore, be allowed to use names, marks, letters, or other indicia by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person. I own it does not seem to me that a man can acquire a property merely in a name or mark; but, whether he has or not a property in the name or the mark, I have no doubt that another has not a right to use that name or mark for the purpose of deception, and in order to attract to himself that course of trade or that custom which, without that improper act, would have flowed to the person who first used, or was alone in the habit of using, the particular name or mark." And in a subsequent case (*c*) the same learned judge again expressed himself to the same effect: "No man has a right," said his Lordship, "to sell his own goods as the

(*a*) See Treatise, p. 230.
(*b*) 6 Beav. 66.
(*c*) *Croft* v. *Day*, 7 Beav. 84; see also *Gout* v. *Aleploglu*, 6 Beav. 69, n.

goods of another. You may express the same principle in a different form, and say, that no man has a right to dress himself in colours, or adopt and bear symbols to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest that to do these things is to commit a fraud, and a very gross fraud. I stated, upon a former occasion, that, in my opinion, the right which any person may have to the protection of this Court does not depend upon any exclusive right which he may be supposed to have to a particular name or to a particular form of words. His right is to be protected against fraud, and fraud may be practised against him by means of a name, though the person practising it may have a perfect right to use that name, provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others." Accordingly, in *Croft* v. *Day*, his Lordship being of opinion that, although the labels used by the defendant upon the bottles of blacking sold by him, were in many points different from the plaintiff's labels, yet there was sufficient to mislead the ordinary run of persons, and that the object of the defendant was to persuade the public that his establishment was in some way or other connected with the plaintiff's, granted an injunction restraining the defendant from imitating the plaintiff's labels. The order made was very specially worded, with a view to prevent the defendant from eluding the jurisdiction by colourable alteration.

In *Perry* v. *Truefitt* (*d*), the point on which the case was principally argued was, whether a certain unguent sold by the plaintiff having acquired a reputation under the name of "Perry's Medicated Mexican Balm," the defendant was at liberty to sell an unguent for the same purpose under the designation of "Truefitt's Medicated

(*d*) 6 Beav. 66.

Mexican Balm." The evidence showed that Truefitt (the defendant) did not attempt to induce the belief that what he was selling was the plaintiff's unguent, but he simply took the sort of fancy designation adopted by the plaintiff, of *Medicated Mexican Balm.* And the question was, whether, in the absence of fraud, the plaintiff had such a right in that designation as to prevent the defendant's use of it. This the Court held to be a legal question; and if that had been the only point, the Court would, it seems, have put the matter in a course for trial of the legal right. But the plaintiff had also, in advertisements respecting his medicated Mexican balm, put forth false representations to the public, and thereby precluded himself (*e*) from obtaining relief in equity in the first instance. The motion was ordered to stand over, with liberty to the plaintiff to bring an action; and some months afterwards the bill was dismissed with the consent of the plaintiff.

It will be observed, that both in *Perry* v. *Truefitt* and *Croft* v. *Day*, Lord Langdale took occasion pointedly to advert to the doctrine of *Millington* v. *Fox* (*f*), and to express his opinion, that an exclusive right of property cannot be acquired in a name or mark. "The case of *Millington* v. *Fox*," said his Lordship, in *Truefitt* v. *Perry* (*g*), "seems to have gone this length, that the deception need not be intentional; and that a man, though not intending any injury to another, shall not be allowed to adopt the mark by which the goods of another are designated, if the effect of adopting them would be to prejudice the trade of such other person. *I am not aware that any previous case carried the principle to that extent.*" The writer believes that there is not any case since *Perry* v. *Truefitt* and *Day* v. *Croft* carrying the principle so far as it was carried in *Millington* v. *Fox*. It will not, however, be forgotten, that that case was most fully argued, and that the judgment is one of the most careful of the

(*e*) *Pidding* v. *Howe*, 8 Sim. 477.
(*f*) 3 My. & C. 338.
(*g*) 7 Beav. 73.

many elaborate judgments delivered by the eminently cautious judge who pronounced it.

Cases of this sort will necessarily depend very much upon the particular circumstances. The principle on which they proceed, subject always to the doctrine of *Millington* v. *Fox*, is fraud; and, as observed by the Master of the Rolls in *Franks* v. *Weaver* (*h*), "nobody has been able to define what fraud is, it is so multiform." It must not be concluded, however, that in case of trade marks or designations a specific use of the plaintiff's name or mark *modo et formâ* is requisite to entitle him to an injunction. The Court in these cases looks not to the letter but to the substance, and if upon the evidence it can come judicially to the conclusion that the defendant has contrived to make it appear to the public that the thing sold by him is prepared by the plaintiff, he will be restrained. Thus in *Franks* v. *Weaver*, where the plaintiff was the proprietor of a medicine sold in wrappers, headed "Franks' Solution of Copaiba," and such wrappers contained testimonials, the defendant was restrained from selling a medicine in wrappers headed "Chemical Solution of Copaiba," setting forth the excellent properties of Franks' solution, and the testimonials to the merits of Franks' solution. The Court came to the conclusion, that though the defendant did not adopt the name of Franks, yet he craftily surrounded the title given to his own solution by such indicia as would lead the public to suppose he was in truth selling Franks' solution, and therefore an injunction was granted.

In a case of *Hine* v. *Lart* (*i*), the plaintiff sought to bring himself within *Millington* v. *Fox* by an allegation supported by some evidence of long exclusive user of a trade mark. The defendants denied the plaintiff's right, but admitted they had closely copied his marks. The evidence was conflicting as to the right. The Vice-Chancellor of England held that the defendants, by imitating the plain-

(*h*) 10 Beav. 297. (*i*) 10 Jurist, 106.

tiff's marks as they had done, must have known they might gain an advantage to which they were not entitled, and supported an injunction. The case seems open to considerable doubt. If it be considered as a case of property, within the doctrine of *Millington* v. *Fox*, it seems inconsistent with the well settled doctrine, that an injunction will not be granted on a doubtful legal right; and as a case of fraudulent imitation, it seems to fail in that which is the essence of such cases, evidence that the defendant held his goods out so that the public bought them as the goods of the plaintiff. Nothing of the kind appears, according to the report, either on the bill or in the evidence. It must be observed, also, on this doctrine of protecting trade marks, that if the differences between the designation adopted by the plaintiff and that resorted to by the defendant, are sufficient to rebut the presumption of deception, an injunction will not be granted (*k*).

(*k*) *London and Provincial Law Assurance Society* v. *London and Provincial Joint Stock Life Assurance Society*, 11 Jurist, 938.

CHAPTER V.

Injunctions to restrain Nuisance.

1. *Nuisances generally.* | 2. *Contingent Nuisance.*

1. IN *Hilton* v. *Lord Granville* (*a*) the Court expressed itself thus: "The rights asserted on the part of the plaintiff and of the defendant are legal rights; and the plaintiff asking for the assistance of a Court of Equity to protect him from a violation of his alleged legal right, ought to show that the right has been established, or that, having had no means of establishing it, but the right being *primâ facie* well founded, the interference of this Court is necessary to prevent that species and extent of mischief which this Court calls irremediable, before the right can be established by legal proceedings."

In this case the plaintiff was a copyholder of the manor of Newcastle-under-Lyne, holding as such some copyhold houses. The defendant was the lessee of the crown of mines of coal and ironstone in the manor; and as such had worked for a long time and was working the mines, so as to have produced actual damage to many other houses similarly situated with the plaintiff's, and so as to produce extreme probability of damage to the plaintiff; but there was no proof that *destruction* or *irremediable* damage was likely to be produced. The defendant's legal right to work was clear, subject to the plaintiff's legal right to be compensated for damage done, if he had such right. The plaintiff had such *primâ facie* right, but it had not been established at law. In this state of things the Master of

(*a*) 4 Beav. 130.

the Rolls refused to interfere, upon the principles above stated.

On appeal, the Lord Chancellor agreed that an injunction could not be granted, but varied the order by directing the motion to stand over, and giving liberty to the plaintiff to bring an action, putting the defendant to make certain admissions necessary for the proper trial of the legal right (*b*).

2(*c*). In *Haines* v. *Taylor* (*d*), where the defendant was proceeding to erect gas works on a piece of ground within 88 yards of the plaintiff's house, and, in addition to the circumstance, that as no gas was yet being made, the injury was prospective and contingent, the evidence was conflicting whether, by the result of scientific improvements proceeding in the manufacture of gas, all offensive effect of the manufacture, when actually commenced, would not be removed, the Court refused a motion to restrain the defendants from proceeding with their building, and from making gas.

(*b*) 1 Cr. & Phil. 283.
(*c*) See Treatise, p. 248.
(*d*) 10 Beav. 75; and on appeal, 2 Phil. 209, and 11 Jurist, 73.

CHAPTER VI.

Injunctions in Aid of specific Performance, and to restrain Breach of Trust or Confidence.

1. IN a case of *Turner* v. *Wright* (*a*), where the bill was filed by a purchaser against a vendor for specific performance, the doctrine of *Spiller* v. *Spiller* (*b*) was acted upon, although that case was not cited. The validity of the contract being questioned, the Master of the Rolls said he would not then decide on its validity; and as to the injunction to restrain the defendant from selling or letting, a purchaser *pendente lite* would take subject to the rights of the plaintiff.

2 (*c*). Although a covenant may not be held to run with the land, so that the assignee of the covenant would not at law be affected, yet if he had at the time of his purchase notice of the covenant, he would be in equity affected so as to be restrainable from committing a breach of it. This was decided in *Mann* v. *Stephens* (*d*), where A. being

(*a*) 4 Beav. 40.
(*b*) 3 Swan. 556; see Treatise, 252.
(*c*) See Treatise, p. 255.
(*d*) 15 Sim. 377; affirmed by the Lord Chancellor, 13th Nov. 1847, *ibid.*; and see 13 Jurist, 89, note *. See also *Tulk* v. *Moxhay*, 13 Jurist, 89.

seised of a house and land, sold the house to B., with a covenant that no building should be erected on the land; afterwards he sold the land to C., and took a counter covenant from him. After mesne conveyances the house became vested in D. and the land in E., but E. had notice of both covenants; it was held that, on that ground, E. was properly restrained from building in breach of the original contract.

In cases of excessively oppressive covenants equity will not interfere, but will leave the covenantee to his remedy at law. Thus where, in a lease of mines, a covenant was introduced, that if the lessor should *at any time* before the expiration or sooner determination of the lease give to the lessee notice of his desire to take all or any part of the machinery, stock in trade, implements, &c. in or about the mines, the lessee should deliver them up, the lessor paying the value of them, to be settled by arbitration: the Court said this was a covenant consistently with which it did not see how the lessee could work the mines to advantage, and so injurious and oppressive to the lessee, that on a bill for specific performance by the lessor, praying an injunction to restrain the lessee from selling or removing the articles mentioned in the notice that the lessor had given, pursuant to the covenant, the Court refused the injunction (*e*).

3. It is to be observed on the cases of *Kimberley* v. *Jennings*, *Kemble* v. *Kean*, and *Baldwin* v. *The Society for the Diffusion of Useful Knowledge*(*f*), that in those cases the bill was for specific performance as well as for an injunction; and in a later case (*Rolfe* v. *Rolfe*(*g*)), the Court took that distinction, and held that where there is a positive agreement incapable of being specifically performed, and a negative agreement, the bill praying only an injunction, the Court will grant it.

(*e*) *Talbot* v. *Ford*, 13 Sim. 173.
(*f*) See Treatise, p. 256 *et seq.*
(*g*) 15 Sim. 88.

Two other cases remain to be noticed on this subject, *Hills* v. *Croll* (*h*), before Lord Lyndhurst, C., and *Dietrichsen* v. *Cabburn* (*i*), before Lord Cottenham, C. In *Hills* v. *Croll* the plaintiff agreed to supply the defendant with certain acids, and the defendant agreed to purchase the acids from the plaintiff, and from no one else. After this agreement had been acted upon for some time, the defendant departed from it, and purchased acids from other persons than the plaintiff. The plaintiff then filed a bill praying a specific performance of the agreement, and an injunction to restrain the defendant from purchasing acids otherwise than from the plaintiff. On a motion for an injunction, which was refused, the Lord Chancellor expressed himself thus:— "There is a stipulation on the part of Hills that he will supply the acids, and there is a stipulation on the part of Croll that he will purchase acids from Hills, and from no other person. Has the Court any power to compel Hills to fulfil his part of the agreement? Can the Court order him to continue the manufacture of acids, or to purchase them elsewhere, for the purpose of supplying the defendant? It is clear, I apprehend, that the Court has no such power. In the case of *Colman* v. *Morris* (*k*), Mr. Colman was restrained from writing for any other theatre, the Court inferring that that would compel him, or have a tendency to compel him, to write for the Haymarket theatre; but in this case the Court has no power to compel the plaintiff to supply the defendant with acids, by ordering him not to supply any other person: that is not the agreement, nor was it ever intended that it should be the agreement; therefore it is clear that the Court cannot, either directly or indirectly, compel him to perform his part of the agreement. And it has been laid down again and again, and very recently in a case before Sir Edward Sugden in Ireland (*l*), that unless the Court can decree specific performance of the whole of a contract, it will not interfere to

(*h*) 2 Phil. 60; 9 Jurist, 645. (*k*) 18 Ves. 437.
(*i*) 2 Phil. 52; 10 Jurist, 601. (*l*) *Gervais* v. *Edwards*, 2 Dru. & War. 80.

enforce any part of it. When, therefore, this cause comes to a hearing, the Court will not have jurisdiction to restrain the defendant from purchasing acids elsewhere, because it will not be able to compel the plaintiff to furnish all the acids that may be necessary for the manufacture carried on by the defendant. If it cannot do this at the hearing, it follows of course that it will not do it in the meantime upon an interlocutory application. The decision of the Vice-Chancellor must therefore be affirmed."

In *Dietrichsen* v. *Cabburn* the defendant agreed to employ the plaintiff as his wholesale agent for the sale of certain oils, and to supply him for that purpose with oil at a discount of 40 per cent. on the current retail prices, and not to sell the oil to any other person for resale at a higher rate of discount than 25 per cent. And the plaintiff agreed to act as the wholesale agent of the defendant, and to pay him for the oils. The plaintiff performed his part of the agreement; but the defendant did not perform his part, supplying other persons than the plaintiff with oils at a higher rate of discount than 25 per cent. A bill was filed not praying in terms specific performance, but praying that which was equivalent, an account and payment of the profits made by the defendant by sales made in violation of the contract, and an injunction. To this bill a demurrer was put in and over-ruled. Lord Cottenham, in dealing with this case, did not at all repudiate the doctrine, that if an agreement cannot be performed in the whole, it will not be performed in part. But his Lordship put the case upon quite another ground, viz. that the jurisdiction of the Court to restrain by injunction an act which a defendant is by contract in duty bound to abstain from, is not confined to cases where the Court has jurisdiction over the acts of the plaintiff. "If," said his Lordship, "the bill states a right and title in the plaintiff to the benefit of the negative agreement of the defendant, or of his abstaining from the contemplated act, it is not, as I conceive, material whether the right be at law or under an agreement which

cannot be otherwise brought under the jurisdiction of a Court of Equity."

Such is the state of the authorities on this question, and the learned reader will of course draw from them his own conclusions. I submit, however, that the balance of authority and the weight of reasoning on principle, are in favor of the doctrine, that where there is the sort of double agreement that is found in the cases cited, what equity will look at is, whether the negative agreement is binding upon the defendant. If it is, the claim of the plaintiff to be protected against the breach of it will be enforced by injunction; and that, whether the bill is or is not as well for specific performance of the positive agreement, as for an injunction to restrain the breach of the negative agreement.

4. On the doctrine of *mandatory injunctions* (*k*) several cases have lately been decided.

In *The Great North of England, Clarence, and Hartlepool Junction Railway Company* v. *The Clarence Railway Company*, (*l*) the principal question between the parties was upon the construction of the act of parliament under which the plaintiffs claimed to act,—whether, assuming that the plaintiffs had a right to make a bridge, pursuant to a certain plan, over the defendants' railway, no part of the permanent supports of such bridge being intended to rest upon the defendants' land, the plaintiffs had a right, by way of temporary easement, to erect poles and other temporary constructions upon land adjacent to the defendants' railway, and to pass and repass across such railway, doing no vexatious acts, compensating for all damage, and not interfering with the regular traffic of the defendants' railway. The defendants, in order to prevent the plaintiffs from so temporarily using their land, had built up a wall which effectually prevented the plaintiffs from carrying on

(*k*) See Treatise, p. 260 *et seq.* (*l*) 1 Coll. 507.

their works; and the bill prayed an injunction to restrain the defendants from continuing to maintain such wall, and from preventing the defendants from making their bridge, &c. In effect therefore the bill sought for an order to compel the defendants to remove their wall. The Court refused to grant the injunction until satisfied, by the opinion of a Court of law, that the plaintiffs had a legal right to build the bridge, and also a legal right to use the defendants' lands by way of temporary easement. But the Court of Exchequer having certified that the plaintiffs had both such legal rights, the Lord Chancellor, supporting the view of Knight Bruce, V. C., that it was no objection to the injunction that it was in effect of a mandatory character, made the order nearly in the terms of the prayer of the bill. To the same effect is *Lord Mexborough* v. *Bower* (*m*), in which an injunction was granted to restrain the defendant (who had cut certain channels from one coal field into another, in derogation of an agreement with the plaintiff) *from permitting the communication to continue open.*

And here may also be mentioned two cases of *Whittaker* v. *Howe*(*n*), and *Taylor* v. *Davis*(*o*). In the former, a motion was made to restrain the defendant, a solicitor, who had sold his business to the plaintiff, and notwithstanding kept possession of books belonging to such business, from detaining and keeping possession of the books, &c. *from the chambers of the plaintiff, and from permitting the same to remain away from the office of the plaintiff.*" Lord Langdale at first made no order upon the motion as to the retention of papers, not it would seem from any doubt of the jurisdiction, but because the defendant's counsel made an offer which, if acted upon, would have rendered the injunction unnecessary; but he afterwards made the order. (*p*)

Taylor v. *Davis* was a case in which one partner hav-

(*m*) 7 Beav. 127.
(*n*) 3 Beav. 383.
(*o*) 3 Beav. 388, n. (*e*).
(*p*) See 3 Beav. 395, note.

ing, contrary to a covenant in the partnership deed, abstracted *a partnership book* from the counting-house of the firm, an injunction was granted, and continued at the hearing of the cause, restraining him *from continuing to violate the covenant.*

5. (*q*) As it is a breach of trust in a trustee to exercise any of the legal powers which he may have as such trustee, except for the legitimate purposes of the trust, a trustee attempting so to do may be restrained. Thus, where the indorsee of a bill, indorsed to him without consideration, for the purpose of recovering upon it against the acceptor, for the benefit of the drawer, attempted to bring an action upon it against the drawer, a demurrer to a bill for an injunction against his proceeding in the action was overruled (*r*).

Nor will a person filling a fiduciary character, such as that of secretary to a loan society, where his duty is to hand over the funds collected by him to the treasurer, be allowed to retain them in satisfaction of a claim for arrears of salary. If he attempts to do so, an injunction will be granted to restrain him from receiving the funds, leaving him to his separate remedy for his salary (*s*).

A covenant by an articled clerk to a solicitor, that he will not, during nor after the expiration of the term of his articles, be professionally concerned for any persons who had been, or should from time to time thereafter become, the master's clients, has been held recently not to be so far in restraint of trade as to prevent the Court from granting an injunction to restrain the clerk, after the expiration of his articles, from acting for persons who had been clients of the master during the articles; and that although, by the terms of the agreement, the master might put an end to the period of the articles at any time upon one week's notice (*t*). An appeal was presented in this

(*q*) See p. 266 *et seq.* of Treat.
(*r*) *Balls* v. *Strutt*, 1 Hare, 146.
(*s*) *Shaw* v. *Hill*, 9 Jurist, 821.
(*t*) *Nicholls* v. *Stretton*, 7 Beav. 42.

case, and a case at law directed. An action on the covenant was brought, the result of which was to support the decision of the Master of the Rolls(*u*). It may be thought that this case goes much further than any of the preceding cases upon agreements in restraint of trade, as by the terms of the covenant the defendant was restricted from being employed by any persons whatsoever who might at any time during the whole life of the covenantee become his clients,—whether the covenantor acquired his knowledge of them through his connexion with the covenantee or not. In *Whittaker* v. *Howe*(*x*), where an injunction was also sustained for enforcing the performance of a covenant by Howe not to practise as a solicitor in Great Britain, although the circle within which the restriction was to operate was very large, the period was limited to twenty years. In that case, the defendants had sold their business of solicitors to the plaintiff, with a stipulation, that after a certain period neither of the defendants "should practise as solicitors or attornies in any part of Great Britain for the space of twenty years, without the consent of Whittaker" (the plaintiff). Howe, one of the defendants, committed a breach of this agreement, by taking chambers near the original place of business that he had occupied, and making demonstrations of commencing practice; and Lord Langdale held the restraint, upon the authorities, not unreasonable, and granted an injunction restraining the defendant from practising in any part of Great Britain.

6. Upon the exercise of the jurisdiction to restrain presenting to a benefice (*y*), there is another case of *Wyvill* v. *Bishop of Exeter*(*z*), where the plaintiff claimed, as a residuary devisee under the will of the owner of an advowson, the right to present on a vacancy that had occurred, but her trustee refused to present; and one of the defendants claimed the presentation under an alleged con-

(*u*) *Nicholls* v. *Stretton*, 11 Jurist, 1008.
(*x*) 3 Beav. 383.
(*y*) See p. 277 of the Treat.
(*y*) 1 Price, 292.

tract for purchase of the advowson from the testator; and the purchaser insisting on his purchase, and accounting for his delay by reason of unremoved objections to the title; and the bishop threatening to take advantage of the lapse, the Court, thinking the defendant had lost the benefit of the presentation by reason of his delay, directed the plaintiff's trustee to present within a given time, and restrained the bishop in the meantime.

CHAP. VII.

Injunctions between Partners.

THE doctrine of *Marshall* v. *Colman* (*a*) has lately been laid down as settled in a case of *Smith* v. *Jeyes* (*b*).

(*a*) 7 Ja. & W. 260; and see Treat. 281. (*b*) 4 Beav. 503.

CHAPTER VIII.

Injunctions relating to Canal, Railway, and other Public Companies.

1. IT has been stated in the Treatise (*a*), that generally a company exceeding the powers given to it by the legislature will be restrained; and this general principle remains undisturbed by more recent cases. But where a company entered upon a man's land, and dug a trench thereon, not strictly pursuing its powers, but it appeared such trench was merely to mark out an anticipated line of railway, and none of the soil was removed from the land, and the company never did anything more, and swore that they did not intend to go any more on the land, the Court refused to make any order, even as to costs, saying that the mischief, if any, having been done, there could be no use in an injunction. It must be observed that, in this case, the plaintiff did not file his bill till nine days after the injury had been discovered by him, and fourteen after it had ceased. The case is obviously sui generis, and neither establishes nor controverts any general principle (*b*).

(*a*) P. 285 *et seq.*
(*b*) *Fooks* v. *The Wiltshire Railway Company*, 5 Hare, 199.

2. On the effect of laches on the rights of parties to obtain or dissolve injunctions, the following cases, confirmatory and explanatory of the doctrine of those referred to in the Treatise (*c*), have been since decided: *Illingworth* v. *Manchester and Leeds Railway Company* (*d*), and *Bickford* v. *Skewes* (*e*).

To these may be added the more recent case of *Bridson* v. *Benecke* (*f*), upon a patent right, in which an injunction was refused on that ground, although the case was such that the Court intimated that, consistently with the principles laid down by Lord Eldon (*g*), it would, if there had not been delay, have been disposed to grant an injunction, pending the trial of the legal right. The plaintiff had been in possession for eleven years, and had succeeded in an action against another person, in which the title had been impeached. He was aware of the alleged infringement in January, 1848, and had an inspection of the defendant's machinery. In April he gave notice to the defendant that he should proceed against him, and had even a bill prepared in May. From that time to December he took no steps, not, however, doing any act to waive his claim; and in December he filed his bill, and moved on the 11th of January. The Court said the plaintiff might, by using proper diligence, have so acted that an injunction should not, or should not materially have injured the defendant; he had not so acted; and by reason of his delay the injunction was refused, with liberty, however, to renew the motion, if the defendant in any way impeded the speedy trial of the right.

3. The principles laid down in *Attorney-General* v. *Corporation of Liverpool* (*h*) are exemplified in a very marked manner in a case of *The Clarence Railway Com-*

(*c*) P. 294.
(*d*) 2 Rail. Cas. 187.
(*e*) Webs. Pat. Cas. 211.
(*f*) Rolls, 9th Feb. 1849, MS.
(*g*) See the cases cited in the Treatise, p. 222, n. (*m*).
(*h*) 1 Myl. & Cr. 171; and see the Treatise, pp. 297, 298.

pany v. *The Great North of England, &c. Company* (*i*), in which the Court, holding the legal title doubtful, and therefore fit to be tried at law, sustained an injunction in part, and dissolved it to the extent of enabling the defendants to complete a contract, which, if not completed forthwith, they might be wholly unable to complete after the determination of the legal right (*k*).

4. The question whether an agreement between parties with respect to their conduct as to proceedings on bills before parliament, or under acts of parliament, will be enforced by injunction, was partly raised in *Lord Petre* v. *The Eastern Counties Railway Company* (*l*). It has received a final determination in *The Stockton and Hartlepool Railway Company* v. *Leeds and Thirsk Railway Company* (*m*). In that case the defendants had agreed not to oppose a certain bill before parliament, and afterwards attempted to oppose it. The question was whether they should be restrained; and the Vice-Chancellor of England, and on appeal the Lord Chancellor, held that there was no doubt on the subject as to jurisdiction, and supported an injunction.

5. In reference to the question considered in *Ware* v. *Grand Junction Waterworks* (*n*), must be mentioned the case of *Ward* v. *The Society of Attornies* (*o*), in which the Society of Attornies, incorporated by charter, was restrained from conveying the property of the society to new trustees, and from surrendering the charter into the hands of the crown, for the purpose of obtaining a new charter for objects differing from those of the original charter; some of the members not consenting to the proposed surrender

(*i*) 2 Rail. Cas. 763.

(*k*) See also *Cory* v. *Yarmouth and Norwich Railway Company*, 3 Hare, 593.

(*l*) 1 Rail. Cas. 462.

(*m*) 2 Phil. 666, and 12 Jur. 713, 786.

(*n*) 2 Russ. & Myl. 470; and see p. 304 of the Treatise.

(*o*) 1 Coll. 370.

and change, and there being no specific power contained in the original charter, enabling a majority to change the interests of the minority (*p*).

6. Before concluding this chapter, it may be well to mention a case of considerable importance, apparently extending the jurisdiction of the Court, though in reality only applying one of its well known principles. In *Goodman* v. *De Beauvoir* (*q*) one question was, whether, if a clause in an act of parliament directs that on persons, named in a warrant of the Speaker of the House of Commons, petitioning the Court for payment out of Court of the monies named in such warrant, the Court *shall* direct the money to be paid, using only imperative words, with nothing on the face of the act to qualify them, such clause is altogether binding on the Court; and Sir L. Shadwell, V. C. E., held that it is not. His Honor held that though the words were imperative, and there was no qualification on the face of the section, though the word stood absolutely "shall," nevertheless, by the inherent authority in the Court to repress fraud, and to prevent false dealing, and to exercise a wholesome control over persons standing in the character of trustees, the section was not imperative on the Court in this sense, or to this extent, that the Court shall not look to the circumstances and see whether it ought or ought not to do that which the legislature has primâ facie commanded to be done; and his Honor was clearly of opinion that the Court had such authority, and decided accordingly, by refusing, as to payment of the money, to allow an order made for paying it out, to be acted upon.

The same jurisdiction was exercised in *Castendiech* v. *De Burgh* (*r*). The language of the Vice-Chancellor in *Goodman* v. *De Beauvoir* may at first sight give an im-

(*p*) See also *Parker* v. *Dunn Navigation Company*, 1 Deg. & Sm. 192.

(*q*) 4 Rail. Cas. 380.

(*r*) 4 Rail. Cas. 386.

pression that his Honor is asserting an inherent jurisdiction in the Court of Chancery to disobey a clear act of parliament in cases of fraud. But I apprehend that that was not the meaning of the Court, but that his Honor was treating the point as one of construction upon the equity of the statute, and so held that the legislature did not mean the clause to be imperative. At any rate, the assertion of any such paramount jurisdiction is not necessarily involved in the decision, which may be supported consistently with the subordination of the Court of Chancery to the authority of the legislature, on the ground explained in an early part of the original treatise (*s*), that the Court acts on the *person* proceeding, not on the Court of superior or co-ordinate jurisdiction. The orders in the two cases above cited were not properly orders in defiance of the direction of the legislature, but orders on the *persons*, staying them from availing themselves of the benefit of the orders made in their favor. For it will be observed by the learned reader, on examination of the cases of *Goodman* v. *De Beauvoir* and *Castendieck* v. *De Burgh*, that in both cases the order for payment had been made; so that what the legislature directed to be done had been done, and then, and not till then, did the Court interfere by injunction, to restrain the person, who had obtained the order for payment, from receiving the monies ordered to be paid to him (*t*).

(*s*) See p. 96 of the Treatise.

(*t*) I think it right to apprise the learned reader, that he will not find mention in this chapter, of all the cases in the books, in which injunctions have been applied for on behalf of or against companies, as in many of the cases the question has been purely one of construction, and that being determined, the granting or refusal of an injunction has been a simple matter of course. I have confined my selection of cases to those in which, as I understand them, some point purely or materially relating to the law and practice of injunctions, has been involved.

CHAPTER IX.

Injunctions in Matters of Bankruptcy.

THE question of the jurisdiction of the Court of Review, since the 1 & 2 Will. IV. c. 56, and 5 & 6 Will. IV. c. 29, to enjoin against proceedings at law, was raised and much discussed in *Ex parte Van Sandau* (*a*). The point was not decided, as the injunction granted was discharged upon other and very special grounds.

CHAPTER X.

Injunctions to remove Outstanding Terms and other legal Impediments.

ALTHOUGH the Court will at the proper time restrain the setting up of a term in an action to try the title; yet if in such an action the plaintiff at law has actually recovered by the aid of a term, even though he led the defendant to suppose he meant fairly to try the legal title, and the production of the term was a surprise upon him, the Court will not on that ground set aside the judgment at law (*b*).

(*a*) 1 Phil. 445.
(*b*) *Master of Clare Hall* v. *Harding*, 6 Hare, 273.

CHAPTER XI.

Of Injunctions in Interpleader Suits.

1. A PLAINTIFF in an interpleader suit ought to use due diligence to get in the answers of the conflicting claimants, to enable the Court to put the disputed claim in a train of investigation. If, therefore, he obtains the usual injunction, and, on one of the answers coming in, does not use due diligence to get in the other, the defendant answering is right in moving to dissolve. But if, after the notice of motion, the other defendant's answer comes in, making a claim, the Court will not dissolve the injunction, or order the money paid in by the plaintiff to be paid out to the first defendant, but will continue the injunction, and put the disputed claim in course of determination (*a*). The costs in such a case were reserved.

But the defendant who has answered is not entitled, as a matter of course, to dissolve the injunction, because the other has not, for the Court is not then in a position to dispose of the matter. The proper course for the Court, is either to give the plaintiff further time to get in the second answer, or to take the bill *pro confesso* against the non-answering defendant; or, if the plaintiff has not entitled himself to that indulgence, then to dismiss the bill. It is clearly irregular, until all the answers are in, to refer the disputed claim to the Master (*b*).

(*a*) *Townley* v. *Dean*, 3 Beav. 213. (*b*) *Masterman* v. *Lewin*, 2 Phil. 182.

2. It has been stated as the practice (*c*) that an interpleader bill must be accompanied by an affidavit of no collusion. If the bill is filed by the officer of a company on behalf of the company, the affidavit must go, not to there being no collusion between the plaintiff and the defendants—the plaintiff being merely nominally so—but to there being no collusion between the company and the defendant (*d*).

If a bill of interpleader is filed in respect of a sum of money on which interest is recoverable at law, the plaintiff ought by his bill to offer to pay the interest (*e*).

3. It has been decided that the Interpleader Act, 1 & 2 Will. IV. c. 58, does not apply to cases where the conflicting claims turn upon an equitable question. Where, therefore, a ship and cargo were in the possession of the sheriff, and the contest was between the execution creditor and an assignee, to whom the assignment had been made before the cargo was on board the ship, the Court considered the question as fit to be decided in equity, because an assignment of prospective cargo, though bad at law, might be good in equity. Under these circumstances the Court restrained proceedings at law, taken under a judge's order made under the Interpleader Act (*f*).

(*c*) See p. 325 of the Treatise.
(*d*) *Bignold* v. *Audland*, 11 Sim. 23.
(*e*) *Ibid.*
(*f*) *Langton* v. *Horton*, 3 Beav. 464.

CHAPTER XII.

Of the Jurisdiction in general to grant Injunctions to stay wrongful Acts of a special nature.

1, *Of unintentional Injury to Rights of Property.*
2. *General Principle on which the Court proceeds in restraining or refusing to retrain the Exercise of disputed Rights.*
3. *Injunctions to restrain Sales.*

1. WHATEVER may be the doctrine at law, it seems that it is not the doctrine of equity, that, if a person has unintentionally done an act injurious to the right of property of another, he is on that ground not amenable to the process of the Court. In the case in which this point was raised (*a*), the plaintiff, a patentee, had brought an action against the defendant, and the Court of Exchequer had held that there was no *direct* infringement, because the defendant had not used the specific substance which *eo nomine* was the subject of the patent; and there was no *indirect* infringement, because, although the defendant had used two substances combined which produced the patented substance, he was not aware that they would form that substance (*b*). After this the plaintiff moved in the suit in equity for an injunction, and the defendants relied on the determination of the Court of common law. Sir L. Shadwell, V. C. E., expressed a strong opinion against the decision at law; and it was said that in the case of *Stevens* v. *Keating*, Lord Cottenham, C., had also disapproved the doctrine of *Heath* v. *Unwin* (*c*). Under all the

(*a*) *Heath* v. *Unwin*, 15 Sim. 552.
(*b*) *Ibid.*; and see 13 Mees. & Wels. 583.
(*c*) 2 Phil. 333, no observation on this point is to be found in the Report.

circumstances, however, no order was made: the bill was retained for twelve months, with liberty to the plaintiff to bring an action. It must, in this state of the authorities, be considered undecided whether, when a legal right is invaded in ignorance of the fact of the invasion, an injunction will be granted. In support of the view taken by the Court of Exchequer, it is to be observed, that if equity will relieve generally against the consequences of a mistake of fact, as it unquestionably will, it would seem to follow that it ought not to punish by its prohibitory process an act done in ignorance of, or under mistake as to, the consequences of that act. On the other hand, if another is in possession of and uses profitably my money, believing it to be his own, unquestionably he will be compelled to account to me for the whole; and it may be asked, what difference there is between possessing and using my money, or possessing and using my invention, if by such possession and use money is made.

2. The proposition stated in the Treatise (*c*), that where the Court has strong doubts whether the legal right will be supported in a Court of law, it will not grant an injunction, hardly perhaps states strongly enough the principle on which the Court proceeds, which is that, wherever the legal right is doubtful, it must be tried at law; and that all the Court has to do in the meantime is to protect the existence of the right in dispute for the party who shall appear ultimately entitled to it, doing as little injury as possible to either party; and for that purpose maintaining or refusing wholly or partially an injunction, according as the balance of inconvenience lies on one side or the other (*d*).

(*c*) P. 330.

(*d*) See *Bacon* v. *Jones*, 4 Myl. & Cr. 443; *Kemp* v. *London and Brighton Railway Co.*, 1 Railw. Cas. 507, and the cases cited in the Treatise, p. 208, n. (*m*); also *Clarence Railway Co.* v. *Great North of England Junction Co.*, 2 Railw. Cas. 763; and *Cory* v. *Yarmouth and Norwich Railway Co.*, 3 Railw. Cas. 524.

In *Ridgway* v. *Roberts* (*e*) the dispute was as to the right of dealing with a ship and her cargo. The Court held that if the plaintiff had any title, it was legal; that title was disputed; and what the defendant had done—which was to take forcible possession of the ship—was therefore trespass, if any offence at all. The Vice-Chancellor Wigram would not grant the injunction, because that would in effect enable the plaintiff to defeat, or at least so to embarrass the defendant's title, as to make it worthless; neither would he simply refuse the injunction. His Honor threw out that the Court might take possession of the ship, to preserve her for the benefit of the party who should be found entitled. Eventually no order was made affecting the possession of the ship, the intimation of the Vice-Chancellor being apparently sufficient to induce both parties to abstain from any dealings with her; and the motion stood over, the defendant undertaking to bring an action of trover for the ship, with liberty to either party to apply for possession or use of her. Nothing in the nature of a threat or danger of injury incapable of compensation by damages was alleged or shown; if any such case had been made, the Vice-Chancellor thought an injunction might be granted. This dictum is quite consistent with the authorities relating to injunctions against trespass (*f*).

3. Under this head may be noticed a somewhat singular case, in which an injunction was granted at the suit of a married woman, entitled to separate estate, to restrain the husband from disposing of or intermeddling with such separate estate (*g*). In the case referred to, leasehold houses and personal chattels, and some money in a savings bank, were settled to the separate use of the plaintiff. The husband, one of the defendants, took possession and disposed of some of the chattels, and entered into and kept

(*e*) 4 Hare, 106.

(*f*) P. 183 *et seq.* of the Treatise, and the cases there cited.

(*g*) *Green* v. *Green*, 5 Hare, 400, n.

possession of one of the houses, and threatened to take possession of the money in the savings bank. An injunction was granted to restrain him from doing these acts, and in particular from *continuing* in possession of the house. A motion to dissolve was refused by the Vice-Chancellor of England. The objection was taken as to that part of the order which restrained the husband from continuing in possession of the house,—that it amounted, in fact, to a divorce *à mensâ et thoro*. To this the Court answered, that if it was so, the husband had his remedy in the Ecclesiastical Court. Perhaps a more solid objection to that part of the order would have been, that it was, in fact, an equitable ejectment.

PART III.

OF THE PRACTICE IN MATTERS OF INJUNCTION.

CHAPTER I.

OF THE MODE OF OBTAINING INJUNCTIONS.

SECTION I

As to Injunctions to stay Proceedings at Law.

1. IT is stated in the Treatise (*a*), that a motion for the common injunction for default of appearance or answer, may be made on any day whether in or out of term. It should be added, as well in the long vacation as at any other time, wherever and whenever in fact the Court is sitting; and so it was held on a motion to discharge orders nisi and absolute, obtained in the long vacation, for irregularity (*b*).

(*a*) Page 348.

(*b*) *Lane* v. *Barton*, 1 Phil. 363. See also *Reece* v. *Humble*, 10 Sim. 117, and *Lord Harborough* v. *Wartnaby*, 1 Phil. 364. But that there is an exception to the rule laid down in the last case, see *Robertson* v. *Skelton*, 10 Beav. 197.

2. The principle acted upon in advancing a demurrer is acted upon in other cases when the effect of delay would be injury to the plaintiff. Thus, by the practice of the Court, a plaintiff cannot refer exceptions to the answer for insufficiency, before the expiration of eight days, (except in a case of election). The consequence would be, under given circumstances as to the period fixed for the trial at law, that the plaintiff might be unable to obtain the common injunction in time to stay trial. In such a case the Court will refer the exceptions instanter. It is not, however, of course to do so, but the plaintiff must make a case, showing that he would be seriously prejudiced by the delay; that he is advised that he has good ground for equitable relief; and that he makes the application bonâ fide, and not for delay (*c*). So if exceptions are shown for cause against dissolving an injunction on the same day they are filed, the Court will still refer them instanter, notwithstanding the 16th order of 1845 (*d*).

3. Within these exceptions has been held to fall the case of a creditors' suit, where both the preliminary decree for accounts, and a decree on further directions had been made, and the plaintiff had been found a creditor of the testator to the amount of 1100*l.*, but no order was made for continuing an injunction that had been made in the suit restraining the executor from getting in the assets. The executor afterwards brought an action against the plaintiff for a much larger sum than 1100*l.* alleged to be due from him. The Court granted an injunction, although it was contended that the final decree having been made without continuing the injunction, it was gone. No authorities appear to have been cited (*e*).

(*c*) *Muggeridge* v. *Sloman*, 9 Beav. 314; *Teesdale* v. *Twindell*, 9 Beav. 491.

(*d*) *Hughes* v. *Thomas*, 7 Beav. 584.

(*e*) *Oldfield* v. *Cobbett*, 5 Beav. 132.

4. If on a bill being filed by some shareholders of a company on behalf of themselves and all others, the common injunction has been obtained, restricting the defendants in the usual form from proceeding against *the plaintiffs*, that will bind the defendants only in regard to the plaintiffs actually *named* on the record. But in that case, a special injunction, founded on the common injunction, may be obtained on special application, to restrain the defendants from proceeding against any of the shareholders represented, it being open, on such a motion, to the defendants to show special grounds why the special injunction should not be granted (*f*).

5. Before concluding this subject, must be noticed the effect of the 4th and 5th sections of the 5 Vict. c. 5. The 4th section gives to the Court of Chancery power to restrain the Bank or any other public company on motion or petition, without bill filed, from permitting the transfer of stock, or from paying dividends. The 5th authorizes the Court to issue a writ of distringas, in the form set out in the schedule to the act, in substitution of the distringas formerly issuable out of the Court of Exchequer.

In a case of *Ex parte Amyot* (*g*), the plaintiff having before the act sued out a distringas in the Court of Exchequer, let his distringas fall, by not filing a bill within the time required under the old practice after notice by the Bank. He then, after the act, filed a bill, and obtained an *ex parte* injunction or restraining order under the 4th section of the act. It was held that his restraining order must be discharged on this ground, that having exhausted his remedy under the old practice, he could not afterwards avail himself of the remedy given by the new statute. But where a party proceeding wholly under the statute, obtains a distringas under the 5th section, that does not, it would seem, preclude him from afterwards obtaining a restraining

(*f*) *Lund* v. *Blanchard*, 4 Hare, 290.

(*g*) 1 Phil. 130, n. (*a*).

order under the 4th (*h*); the remedies are cumulative. A restraining order under the 4th section continues in force until discharged. It does not fall merely on a bill being filed; but it would seem that the statute did not intend to confer a new jurisdiction on the Court, otherwise than for interim purposes, and therefore that in order to sustain the restraining order, a bill should be filed in due time (*i*).

It is also proper to notice the modern practice which has grown up of granting what are termed interim orders. They are in fact temporary *ex parte* injunctions, which are granted when the plaintiff not showing quite a case for an *ex parte* injunction without more, shows a case for giving short notice, and for protection in the mean time. The interim order is therefore an injunction obtained *ex parte*, to be in force till the injunction has been disposed of on notice. It is generally accompanied by putting the plaintiff on terms to give an undertaking for any damage done to the defendant by the interim order.

SECTION II.

As to obtaining Special Injunctions.

1. The cases of exception mentioned in the Treatise (*k*), to the rule that a special injunction cannot be obtained

(*h*) *Ex parte Marquis of Hertford*, 1 Phil. 129.

(*i*) *Re Marquis of Hertford*, 1 Hare, 584; S. C. 1 Phil. 203.

(*k*) Page 364 *et seq.*

without a bill, have been there mentioned, and the authorities have been referred to, because the learning, though obsolete, may not be without its use. At this day, however, the universal practice is to file a bill in or out of vacation. If the plaintiff wishes to move on notice, he may obtain leave to serve a notice of motion, upon the statement of counsel that subpœna has issued, and that a bill is prepared though not filed. Of course the bill must be filed before the motion is actually made (*l*).

2. An injunction was granted in a recent case where a receiver had been appointed and had let to A. as a tenant from year to year, A. agreeing to cultivate in a husband-like manner. A. being under notice to quit, was removing the hay and straw, &c. contrary to the custom of the country. He was restrained, although no party to the cause (*m*).

3. It has been stated in the Treatise, that it is the duty of a person coming with an *ex parte* application not to misrepresent the facts, and to state all the material facts (*n*), and if he does not, the injunction will be dissolved on that ground alone, even although he should afterwards show merits. To this may be added, that it is his duty to come quickly upon the discovery of his right, and without having in any manner led the opposite party to suppose his case to be different from that which he really intends to make (*o*).

4. Where the very frequent course is taken of ordering a motion for an injunction to stand over, with liberty to the plaintiff to bring an action, and the plaintiff does not

(*l*) *Fosbrook* v. *Woodcock*, 12 Jur. 956.

(*m*) *Walton* v. *Johnson*, 15 Sim. 352.

(*n*) Treatise, p. 372; and see further, *Hilton* v. *Ld. Granville*, 4 Beav. 130.

(*o*) *Barker* v. *North Staffordshire Railway Company*, 12 Jurist, 589.

proceed to bring any action, the defendant will be entitled to have the motion dismissed with costs (*p*).

Though in general a special injunction cannot be granted unless prayed, yet under special circumstances it may be done (*q*). And in a suit for foreclosure, if after decree the mortgagor being in possession commits waste, an injunction will be granted, although the bill does not pray it (*r*).

(*p*) *Perry* v. *Truefitt*, 6 Beav. 418.
(*q*) *Blomfield* v. *Eyre*, 8 Beav. 250.
(*r*) *Goodman* v. *Kine*, 8 Beav. 379.

CHAPTER II.

Extending the common Injunction to stay Trial.

1. *As to the Affidavit of materiality.*
2. *Effect of Delay in obtaining common Injunction.*
3. *As to Affidavit being contradicted, and of the doctrine of* Thorpe *v.* Hughes.
4. *Form of the common Injunction.*
5. *As to resisting the Motion on the ground of Answer being filed, and as to Insufficiency of the Answer.*
6. *Where Motion to extend made on amended Bill.*

1. THE rule that, in support of a motion to extend, the affidavit of materiality will not do, if made only by the plaintiff's solicitor, unless good reason is shown why the plaintiff did not make it, has been supported in a recent case (*a*).

2. In the same case, the plaintiff did not move to extend till the 2nd December, the trial being fixed for the sittings commencing on the 6th. It appeared that the action was brought on the 11th August; that the plaintiff from the circumstances must have known what was the cause of action, and nevertheless he did not file his bill till the 8th November; and even after that, he knew that proceedings were going on at law, and might have got the common injunction on the 17th November, instead of which he never moved for it till the 24th. Under these circumstances it was held that his delay would preclude him from obtaining an order to extend so near the time of trial, unless the answer was insufficient; and, the answer having been excepted to and found insufficient, the Vice-Chancellor looked into it to see whether the defendant had mis-

(*a*) *Seotson* v. *Gaury*, 1 Hare, 99.

conducted himself by evasion in his answer, in which case his Honor thought he might, perhaps, set off such misconduct against the dilatoriness of the plaintiff. The answer was substantially sufficient, though technically insufficient, and therefore the motion was refused.

It has been also held that an order to extend will not be made close to the time of the assizes, even on the terms of the plaintiff giving security for costs, if there has been gross delay (*b*).

3. With reference to the point discussed in the Treatise(*c*) in reference to *Thorpe* v. *Hughes* (*d*), may be noticed the recent case of *Ashby* v. *Jackson* (*e*) in which the case of *Thorpe* v. *Hughes* was cited, and its doctrine acquiesced in by the Court. It is to be presumed, however, from what is stated in the report of *Ashby* v. *Jackson*, that that case fell more properly under the rule in *White* v. *Steinwacks* (*f*), as it would seem that in *Ashby* v. *Jackson* the fact that the discovery would be of no use to the plaintiff in his defence at law, appeared upon the pleadings, if at all.

4. The pendency of proceedings before a judge at chambers to settle the pleas in an action is no ground for departing from the common form of an order to extend the common injunction, by inserting a direction that it shall be without prejudice to the plaintiff at law proceeding to complete the issue (*g*).

5. In reference to the rule, that the answer, in order to be used as an objection against an order to extend, must be filed on the preceding day, it may be stated that an allegation at the bar that the answer is drawn, and an undertaking to file it before the trial, is not a sufficient ground for resisting a motion to extend (*h*).

(*b*) *Stokes* v. *Wilson*, 12 Sim. 91.
(*c*) P. 378.
(*d*) 3 Myl. & Cr. 761.
(*e*) 6 Beav. 336.
(*f*) 19 Ves. 83.
(*g*) *Woodall* v. *White*, 3 Hare, 411.
(*h*) *Partridge* v. *Comings*, 7 Jurist, 1122.

The case of *Munnings* v. *Adamson* (*i*) has been overruled by a recent decision, *Scotson* v. *Gaury* (*k*); in that case the common injunction was obtained on the 24th November, and notice of motion given for the 2nd December to extend the injunction to stay trial, which was fixed for the sittings commencing on the 6th December; the answer was filed on the evening of the 1st December, and on the motion being made on the following day, the Court was asked, upon the authority *Munnings* v. *Adamson*, to look at the answer without exceptions, to see whether it was insufficient. The Vice-Chancellor Sir J. Wigram, after taking time to consider, said, "When the case was mentioned yesterday, I was strongly impressed with the belief that the practice of the Court had not been in accordance with the course which Sir Anthony Hart is reported to have taken in the case of *Munnings* v. *Adamson*. There are many other cases in the books in which the same reasons of hardship on the plaintiff in equity, and the same apparent necessity for the Court to look into the answer must have existed, as in the case of *Munnings* v. *Adamson*, yet in no other case does it appear that the Court ever took upon itself, without exceptions before it, to examine the answer and decide upon its sufficiency. I have referred to the cases of *Whitehouse* v. *Hickman*, *Ibbetson* v. *Booth*, *Bruce* v. *Webb* and *Bishton* v. *Birch*. I also find, upon inquiry, that the most experienced registrars have no knowledge of any such a practice as that which I am desired to follow upon the authority of *Munnings* v. *Adamson*. In addition to the cases which I have mentioned, I have been referred to that of *Thompson* v. *Byrom*, but I do not find that Lord Langdale in that case followed, or had occasion to follow, the precedent of *Munnings* v. *Adamson*. If it had appeared that it was the practice of the Court to do that which I am now asked to do, I should of course have been bound to follow that practice, but that certainly does not appear. Very serious

(*i*) 1 Sim. 510. (*k*) 1 Hare, 99.

objections would in my opinion attend such a practice. If the plaintiff delivers exceptions, the defendant may put in a further answer, and give the discovery which is sought, and save his opportunity of immediately proceeding to trial. On the other hand, if the Court takes up the answer and merely says it is sufficient, without defining in what particulars it is so, which it cannot adequately do without exceptions being taken, there are no means within the practice of the Court by which the defendant can file a further answer, and thereby relieve himself from the injunction. Nor has he the means of combating the opinion of the Court upon the very question of the sufficiency of the answer. It was suggested that the Court might put the plaintiff upon the terms of filing exceptions instanter, but he may not be able, even if willing, to do so in time to admit of a further answer being filed before the day of trial, in the meantime the action is restrained by the injunction. This is not just, unless the defendant is in some default." But in such a case, if the plaintiff will except to the answer, the Court will hear the application instanter.

6. In *Stratford* v. *Lewis* (*l*) the same point that arose in *Simes* v. *Duff* (*m*) occurred again before the learned judge who had decided that case, and his Honor again made an order to extend, *Mellor* v. *Cresswell* (*n*) being cited.

Since the cases of *Mellor* v. *Cresswell* and *Howard* v. *Cliffe* (*o*), it has been held by Lord Langdale, M. R., in a case (*p*) where there was a common injunction obtained upon the answer being found insufficient; then an order to amend the bill without prejudice to the injunction; and then amendment of the bill accordingly; that an order to extend the common injunction to stay trial might be granted. The motion was made on the 3rd of July, and

(*l*) 8 Jurist, 484.
(*m*) 8 Sim. 270.
(*n*) 2 Myl. & K. 616.
(*o*) 3 Jurist, 817.
(*p*) *Archer* v. *Hudson*, 6 Beav. 474.

the commission-day appointed for the 12th. His Lordship appears to have considered the case as distinguishable from *Howard* v. *Cliffe*, as he observed, that if the authority of that case applied, he should refuse the motion. The report of *Archer* v. *Hudson* does not, however, state the grounds on which the Court distinguished it from *Howard* v. *Cliffe*.

And still more recently, in *Goddard* v. *Smith* (*q*), both *Mellor* v. *Cresswell* and *Simes* v. *Duff* being cited, the Master of the Rolls held that where an answer had been reported insufficient, and then the plaintiff obtained an order to amend, and that the defendant might answer the exceptions and amendments together, and at the same time obtained the common injunction, a motion to extend the injunction to stay trial was regular.

(*q*) 8 Beav. 41.

CHAPTER. III.

Of the Effect on Injunctions of Amendments, and of reviving an Injunction.

1. IN *Brooks* v. *Purton* (*a*) the Vice-Chancellor Knight Bruce, following *Ferrand* v. *Hamer* (*b*), appears to have considered the point in that case as settled independently of the second order of May, 1839. However that may be, the practice is now settled by that order; and accordingly is the case of *Warburton* v. *Blackwall Railway Company* (*c*); but it does not follow from that case, that the fact of amending the bill may not under circumstances afford ground for dissolving the common injunction, without answering, and independently of the merits of the case (*d*).

In *Wright* v. *King* (*e*), after the answers had been filed more than twelve months, a motion was made to the Court for leave to amend a bill *without prejudice to the injunction;* and it was held, that as the plaintiff was desirous to amend, with an adjunct, (viz. that the amendment should be without prejudice), over which the Master had no jurisdiction, the application was properly made to the Court, and not to the Master. In this case, neither the second order of May, 1839, nor the case of *Warburton* v. *The London and Blackwall Railway Company* (*f*), were mentioned. It is difficult, consistently with the latter case, to see why, in *Wright* v. *King*, the application should not

(*a*) 1 You. & Coll. C. C. 271.
(*b*) 4 Myl. & Cr. 143.
(*c*) 2 Beav. 253.
(*d*) *Brooks* v. *Purton* cited supra.
(*e*) 9 Beav. 161.
(*f*) 2 Beav. 253.

have been made to the Master, because it was unnecessary to have inserted in the order for liberty to amend, the words *without prejudice*, and therefore the common application, which was within the Master's jurisdiction, would have been sufficient. Probably all that the Court meant to say was, that if the plaintiffs desire their order to amend to contain the words *without prejudice*, the application must be made to the Court.

2. Before the third order of May, 1839, it had been held, that the tenth order of 1833, so far as regarded injunctions, did not apply, except to injunctions to be granted on original bills; consequently that the plaintiff could not have an injunction for default on an amended bill till five weeks after appearance in a town cause, and seven weeks in a country cause, if the amendment was made *after* appearance; but if the amendment was made *before* appearance, that rule did not apply (*g*).

But this construction of the order was in effect overruled in *Brooks* v. *Purton* (*h*), where it was held that the tenth order of 1833 included amended as well as original bills; and that the third order of the 9th of May, 1839, applied only to those cases where the equity for an injunction contained in the original bill having been effectually displaced by the answer, the plaintiff afterwards introduced a new case by amendment: it is in those cases only, therefore, that an affidavit of the truth of the amendments is requisite.

The tenth order of 1833 is discharged by the first general order of May, 1845. The third order of May, 1839, remains in force. By that order it appears immaterial whether the amendment is made before or after appearance; in either case, if the defendant makes default in pleading, answering or demurring within eight days after appearance, the plaintiff may have an injunction on his amended bill, on affidavit of the truth of the amendments.

(*g*) See p. 394 of the Treatise. (*h*) 1 Cr. & Phil. 233.

CHAPTER IV.

Of Breach of an Injunction and its Consequences.

1. AS to what is sufficient service, generally an injunction ought to be served on the defendant personally, or on some person who by an order of the Court is substituted.

And where, before the orders of 26th October, 1842, the clerk in court of the defendant was served, without order, with an injunction, it was held that that was not good service, because the clerk in court was only the agent of the party to receive notice of the proceedings in the cause; but an injunction is extraneous to the cause, and not a proceeding in it. But, if the plaintiff cannot succeed in serving it on the defendant, and the defendant's solicitor refuses to accept service, service will be ordered on the solicitor (*a*).

2. Whether a defendant has committed a breach of a special injunction, is a mixed question of fact and of construction; and it need scarcely be observed that a defendant, having been enjoined from permitting a particular effect, capable of being produced by several causes, to be produced by a given cause, is not to be treated as guilty of a breach, merely because the effect has taken place, without proof connecting the effect with the particular cause. This was held in a case of *Dawson* v. *Paver* (*b*).

(*a*) *Kirkman* v. *Honnor*, 6 Beav. 400. (*b*) 5 Hare, 424.

The point was simply one of evidence, and seems to have been almost too clear for argument.

It is a breach, after the common injunction has been extended to stay trial, to obtain a judge's order for changing the venue (*c*). And it is a breach of the common injunction restraining execution, if the defendant, having paid the money in dispute into the Court of law, proceeds after verdict to obtain a rule nisi to show why the money should not be paid out to him; for that is a step towards execution (*d*).

But if a motion to commit for breach of an injunction for commencing an action, has been refused by the Court below, and then, pending a motion in the nature of an appeal motion, the plaintiff pleads to the action, that is not waiver of his right to move to commit before the superior Court (*e*).

In *Wellesley* v. *Lord Mornington* (*f*) a motion was made to commit one Battley (who was Lord Mornington's steward) for cutting timber, &c. in defiance of an injunction granted against Lord Mornington personally, without mentioning his servants and agents. Battley had notice of the injunction. Lord Langdale allowed an objection that the injunction being against Lord Mornington alone, it was no breach in Battley to do the acts enjoined, and refused the motion, but without costs (*g*).

In a recent case (*h*) the bill was filed by three shareholders of a company on behalf of themselves and the others, and the common injunction was obtained, running in the usual form to restrain proceedings by the defendants against the *said complainants*. The defendants put in their answer, and on account of its length and the extent of the transaction in question the plaintiffs obtained time for showing cause against dissolving the injunction on the

(*c*) *Pariente* v. *Bensusan*, 13 Sim. 522.

(*d*) *Brooks* v. *Purton*, 1 You. & Coll. C. C. 271.

(*e*) *Newman* v. *Ring*, 10 Jurist, 463.

(*f*) Rolls, 4 May, 1848, MS., and 12 Jurist, 867.

(*g*) See also on this point *Lewis* v. *Morgan*, 5 Price, 518.

(*h*) *Lund* v. *Blanchard*, 4 Hare, 290.

merits. In this state of things the defendants proceeded in their action against *others* of the shareholders not named as plaintiffs; and it was held that this was no breach, as the injunction only applied to the persons named as complainants, and could only, as an order of course, benefit the shareholders generally, so far as an order in favor of those assuming to represent the shareholders would benefit them. But the Court held that in such a case, having regard to the rule which admits of a numerous body being represented by a few of its members, a special motion to restrain proceedings against the shareholders represented, but not named, might be founded on the common injunction obtained in favor of the persons named; but on such a motion it would be open to the defendants to show any special circumstances by which they might be prejudiced if the injunction were granted, and against which the Court would protect them, if all the shareholders were named as plaintiffs.

CHAPTER V.

OF THE PRACTICE ON DISSOLVING INJUNCTIONS.

SECT. I.

As to dissolving Injunctions to stay Proceedings at Law.

1. THE terms of the order nisi to dissolve the common injunction are, that the injunction is to be dissolved unless the plaintiff, his solicitor having notice, shall, on a day (named in the order) show to the Court cause to the contrary; and these terms were considered to be inconsistent with the allowance of any further time to the plaintiff to show cause. Therefore, where the answer was filed on the 30th May, and same day the defendant obtained and served an order nisi, the Court refused on the 2nd June (the day on which the cause was to be shown) to allow the plaintiff any further time, although the answer was of great length; so that it was manifestly out of all question that the two days could have been sufficient for the plaintiff to look into the answer to see whether exceptions should be taken to it (*a*); but this rule has been departed from in a late case, which seems undistinguishable from

(*a*) *Stanley* v. *Bond*, 5 Beav. 175.

Stanley v. *Bond.* In the case referred to, the plaintiff had been unable to obtain an office copy of the answer at the time when the defendant was entitled to move to make the order nisi to dissolve absolute, and time was given to the plaintiff to see whether he would show merits or exceptions for cause against dissolving (*b*).

2. The case of *Sharpley* v. *Perring* (*c*) was referred to in *Bordinave* v. *Wadeson* (*d*), in support of a special motion to dissolve at once the common injunction. The Court refused the motion, with expressions of want of confidence in the accuracy of the report of the case of *Sharpley* v. *Perring*, which, his Honor observed, was stated to be *ex relatione*, without stating by whom it was reported. It is to be regretted that the special circumstances in *Sharpley* v. *Perring* are not stated in the report. In *Bordinave* v. *Wadeson* there were no very special circumstances, and therefore *Sharpley* v. *Perring* was clearly no authority for departing in that case from the usual practice of first obtaining an order nisi. The observations of the Court in *Bordinave* v. *Wadeson* must be taken, however, to throw much doubt on the authority of *Sharpley* v. *Perring*, for even the limited doctrine, that in any case (except cases of the class of *Lacy* v. *Horneby* (*e*)) the order nisi can be dispensed with in proceeding to dissolve the common injunction.

3. In a very recent case the Vice-Chancellor of England held, that, since the 11th Order of 1841, exceptions for impertinence cannot be shown for cause against dissolving an injunction (*f*). His Honor said, "Under the New Orders of the Court, an answer cannot be referred generally for impertinence, but the matters alleged to be impertinent must be specified by way of exception. Why, then, may not the answer in this case be taken as an

(*b*) *Gibson* v. *Chayters*, 8 Beav. 167.
(*c*) 8 Sim. 603.
(*d*) 1 Coll. 432.
(*e*) 2 Ves. & B. 291.
(*f*) *Simeon* v. *Davis*, 12 Sim. 46.

answer, disregarding those parts of it which have been excepted to as being impertinent." If this decision was right under the Orders of 1841, it is so equally now under the 38th Order of 1845. But the professed reason of it seems open to this objection, that it does not answer the reason given in *Goodinge* v. *Woodham* (*g*), viz. that as an answer cannot be excepted to for insufficiency, if it is intended to refer it for impertinence, and as there must be a judgment upon the reference for impertinence before there can be a judgment on the insufficiency, and as exceptions for insufficiency may be shown as cause against dissolving, all proceedings necessarily preceding them must also be sufficient cause. If, in accordance with *Simeon* v. *Davis*, the answer is to be taken as an answer, disregarding those parts of it which are excepted to for impertinence, the result would be, that a motion to dissolve would be made upon statements in the answer, which may be afterwards successfully excepted to as insufficient.

4. As to the practice on references for insufficiency, the 16th General Order of 1845, sect. 25, is substituted for the 5th General Order of 1828.

The 16th Order of 1845, sect. 25, has not altered the practice as to referring exceptions instanter in injunction causes, although in the 5th Order of 1828 injunction causes are expressly excepted from the delay of eight days before referring, and are not so in the Order of 1845. The principle is this, that in an injunction cause the plaintiff is not, technically speaking, put to *refer* his exceptions at all, but his right is to show his exceptions as cause against making the order nisi absolute; and then the Court, to avoid giving unjust credit to the exceptions, instead of looking into them, makes the reference *mero motu*, or at the request of the defendant (*h*). The practice in other respects stated in this section seems also unaffected by the 16th Order of 1845.

(*g*) 14 Ves. 536.

(*h*) *Hughes* v. *Thomas*, 7 Beav. 584.

5. It has been settled that the Court is always open, and that as well in the long vacation as at any other time, both for granting and dissolving injunctions; and orders nisi and absolute to dissolve the common injunction, both obtained in the long vacation, were held regular (*i*).

6. The point referred to in the Treatise, p. 419, has lately been decided upon a review of the authorities, and it has been held that where there is a common injunction against several defendants, some who have answered may dissolve as against themselves before the answers of the others have come in; but they must first obtain the order nisi, and then proceed in the usual course to make the order absolute. The order nisi should also be taken expressly worded, so as to dissolve as against the particular defendants moving (*j*). In a recent case (*k*) an injunction had been obtained, and afterwards extended, to stay trial in a joint action; some of the defendants answered, and dissolved the injunction as against themselves; afterwards the others answered, but would not move to dissolve. Those who had dissolved as against themselves then moved to dissolve as against the other defendants, without serving those others with notice of the motion. It was held that, the action being joint, the interest must be presumed to be joint in the absence of any suggestion to the contrary; it was held also, on the authority of *Joseph* v. *Doubleday* (*l*), that some defendants may move to dissolve against all; and the plaintiff not suggesting that the absent defendants desired the injunction to continue, that notice to them was not necessary, and the injunction was accordingly dissolved.

7. On the same principle, it should seem, on which it is held, that if a bill is dismissed, an injunction granted on such bill falls with it, is founded the rule, that where an

(*i*) *Lane* v. *Barton*, 1 Phil. 363. Jurist, 956.
(*j*) *Lewis* v. *Smith*, 7 Beav. 470. (*l*) 1 Ves. & Bea. 497.
(*k*) *M'Gregor* v. *Conyngham*, 12

injunction has been obtained, and a demurrer to the whole bill is allowed, the injunction is gone, and that although leave is given to amend (*m*).

8. In *Forster* v. *Teward* (*n*), where the plaintiff showed for cause against making the common order nisi absolute, that the defendant had upon his answer been indicted for perjury, and that a true bill had been found against him, Lord Langdale, M. R., on the authority of *Clapham* v. *White*, held that insufficient cause.

On the question whether, where facts are alleged by the bill, and the answer simply ignores them, affidavits can be read in support of the bill, there has been much conflict of authority. In the case of *Ord* v. *White* (*o*) facts essential to the plaintiff's case were alleged in the bill, and by the answer neither admitted nor denied, but simply ignored. The Master of the Rolls thought (though it was not necessary to decide the point, as he granted the injunction irrespectively of the affidavits tendered by the plaintiff,) that in such a case affidavits may be read by the plaintiff to prove the allegations of the bill. The case of *Castellain* v. *Blumenthal* (*p*) was not cited in *Ord* v. *White*.

In *Barwell* v. *Barwell* (*q*) the defendant by her answer stated, as to certain facts, that she had *been informed and believed* it to be true, &c.; and *Ord* v. *White* was cited as an authority for reading affidavits on behalf of the plaintiff to contradict those statements in the answer. But Lord Langdale, M. R., refused to hear them, observing that no one ever doubted that affidavits are inadmissible, when the defendant distinctly states his belief. His Lordship referred to his dictum in *Ord* v. *White*, observing that he had not decided the point, and neither recalling nor reasserting the opinion that he had there expressed.

The case of *Edwards* v. *Jones* (*r*) seems to have settled

(*m*) *Schneider* v. *Lisardi*, 9 Beav. 461.
(*n*) 5 Jurist, 1031.
(*o*) 3 Beav. 357.
(*p*) 12 Sim. 47.
(*q*) 5 Beav. 373.
(*r*) 13 Sim. 632; 1 Phil. 501.

the point, although not upon an injunction motion. In that case, on a motion for a receiver, among other things, an affidavit was tendered by the plaintiff to prove the death of a particular person (the period of whose death was very material), the answer ignoring the fact of the alleged death. It was contended, on the authority of *Ord* v. *White* and other cases, that the affidavit was admissible; but the Vice-Chancellor of England held the affidavit inadmissible, and, on appeal, Lord Lyndhurst, C., affirmed the decision. "An affidavit," said his Lordship, "was offered to prove the fact that Howell Powell (the person whose death it was material to ascertain) was alive at the time of the death of the intestate. Now, where the question at issue is not the existence of a document, but a fact, I think that an affidavit cannot be admitted to prove it in an interlocutory application like the present, though the answer neither admits nor denies it. There is an apparent discrepancy between the authorities on the subject, but I think that is the fair result of them (*s*)."

Section 2.

Of Dissolving Special Injunctions.

1. Where a plaintiff obtains an injunction upon affidavits, the defendant, although he might try the question by

(*s*) It may be proper here to remind the reader, that if an injunction is to be obtained or sustained on the merits confessed by the answer, the Court does not require for that purpose the degree of certainty which would entitle the plaintiff to a decree. It is sufficient if upon the answer a case of doubt appears, requiring investigation. See p. 12 of the Treatise, and *Glasscott* v. *Long*, 3 Myl. & Cr. 451; *Willincsk* v. *Bentinck*, 2 Hare, 1, see p. 11; *Ord* v. *White*, 3 Beav. 357.

demurrer, is not under any obligation to do so, if he thinks that by moving to dissolve upon affidavits, he can place his case better before the Court (*s*).

The same point in effect arose in *Hudson* v. *Maddison* (*t*), where it was contended that an objection which can be taken by demurrer or at the hearing cannot be taken on a motion to dissolve an injunction. The Court thought it clear that it may. However, a motion to dissolve on the coming in of the answer will not be permitted to proceed pending a motion for production of documents, because the contents of the documents are part of the discovery which the plaintiff is entitled to extract from the defendant (*u*).

2. On the subject of reading affidavits, several important cases have been decided since the publication of the original Treatise.

(a). First, as to the limit to the filing of affidavits and counter-affidavits.

Generally it may be said that the Court will at any time, before a motion is actually heard, postpone it, to allow of further affidavits, if the respondents desire it. Of course the party moving, can always save his motion if he wishes to file further affidavits. But if a respondent allows a motion to be partly heard, he will not be allowed to read affidavits filed afterwards, nor will the Court postpone the further hearing of the motion to allow such affidavits to be answered. The motion once fairly opened must be heard through, on the affidavits then before the Court (*x*). To this principle must be referred two cases, in which it has been decided, that if a defendant moves upon his answer to dissolve, he cannot read as part of his case affidavits filed after the answer; because, it was said by the Court,

(*s*) *Barnesley Canal Company* v. *Twibill*, 7 Beav. 19.

(*t*) 12 Sim. 416.

(*u*) *Storer* v. *Jackson*, 12 Sim. 503.

(*x*) *Electric Telegraph Company* v. *Nott*, 11 Jurist, 273.

the plaintiff could not reply to such affidavits (*y*). For if the defendant filed after his answer affidavits before the motion, giving due notice, there seems no reason why he should not read his affidavits as well as his answer, treating of course his answer as an affidavit (*z*).

(b). Where a notice of motion was given before answer, and affidavits filed in support of it, and the motion stood over at the request of the defendant, that he might put in his answer, and after he had done so, the plaintiff filed further affidavits in respect of title, contradicting the answer: it was held, that under those circumstances the answer must be treated as an affidavit, and consequently the further affidavits were admissible (*a*). But if a motion for a special injunction is made after the answer has come in (the motion not having stood over for the defendant's convenience, and that he may put his answer in), and no affidavits were filed before the answer, affidavits filed after the answer cannot be read in support of the motion even as to matters not connected with title; and that, irrespectively of the question whether the notice was given before the answers were put in, or afterwards (*b*); still more if the motion stood over for the plaintiff's convenience (*c*). The judgment in *Manser* v. *Jenner*, and the learned reporter's notes, contain nearly all the learning upon this point.

In *Gardner* v. *M'Cutcheon* (*d*), where, on a motion for an injunction to restrain a partner from getting partnership property into his possession, affidavits had been filed in support of the application, and then the defendant put in his answer, and affidavits were subsequently filed on both sides, it was held that the answer must be treated as

(*y*) *Barwise* v. *Brooks*, 7 Jurist, 364; and *Corporation of Liverpool* v. *Morris*, 11 Jurist, 509.

(*z*) *Gardener* v. *M'Cutcheon*, 4 Beav. 534.

(*a*) *Gibson* v. *Nicol*, 6 Beav. 422. See also *Maden* v. *Vevers*, 5 Beav. 503.

(*b*) *Manser* v. *Jenner*, 2 Hare, 600; *Lloyd* v. *Jenkins*, 4 Beav. 230.

(*c*) *Woodin* v. *Field*, 15 Sim. 307.

(*d*) 4 Beav. 534.

an affidavit, and the plaintiff's affidavits might be read against it. This case was referred to in the very recent case of *The Attorney-General* v. *Strange* (*e*), where affidavits had been filed with the bill, and an *ex parte* injunction obtained. Then the answer was put in, and then affidavits were *filed* on both sides, and then a motion was made to dissolve. The defendants, instead of reading, formally withdrew their affidavits; and on the plaintiffs tendering theirs filed after the answer, objected to their being read. The case of *Gardner* v. *M'Cutcheon* was cited, but the Court distinguished the case before it, on the ground that in *Gardner* v. *M'Cutcheon* the defendant must have read his affidavits, whereas here the defendants had withdrawn theirs. The point did not call however for actual decision, as the plaintiffs' affidavits were rejected on other grounds.

Finally, in a very recent case, it was held, following *Norway* v. *Rowe* (*f*), that even where the plaintiff's affidavits are filed before the answer, if the motion is not made till after the answer has been put in, the affidavits cannot be read against the answer on matter of title (*g*). And here must be noticed another recent case (*h*) calculated to mislead, as it would appear from the report, that affidavits were read against the answer on a matter of title, on a motion made after answer. The fact was, as I have been informed by counsel engaged in the case, that the motion had stood over for the convenience of the defend-

(*e*) V. C. K. Bruce, December, 1848, MS.

(*f*) 19 Ves. 143.

(*g*) *Rocke* v. *Matthews*, 12 Jurist, 643. The report is not perfectly clear as to whether the affidavits were tendered on matter of title only, or whether they were also tendered and rejected as to matter of *fact*. The writer has examined the registrar's minute-book of the day, and from that it appears clearly that the objection was taken to affidavits being read on a question of *title*, the contention on the plaintiff's part being that they might be read, even on that question, if filed before the answer. The affidavits were, as mentioned in the text, rejected.

(*h*) *Commissioners of Greenwich Hospital* v. *Blackett*, 12 Jurist, 151.

ant, that he might put in his answer, so that the answer was treated as an affidavit, on the principle of *Gardener* v. *M'Cutcheon*. The defendants appealed, and the matter was compromised before the appeal was heard.

It must not be forgotten, that an injunction obtained *ex parte* must stand or fall by the substance of the statements of the bill on which it was obtained. It follows, that affidavits cannot be read in support of the injunction, to prove facts stated by amendment, tending to strengthen the right to the injunction (*i*).

3. It has been doubted whether, where a special injunction has been granted against several defendants, one of them can move to dissolve without bringing the others before the Court. The ground of the doubt is, that if the defendant moving should succeed, he materially changes the position of the other defendants. The Court, however, doubted at the same time whether, if present, the defendants not moving to dissolve, could oppose the motion (*k*). The point was not decided.

(*i*) *Attorney-General* v. *Strange*, 13 Jurist, 110.

(*k*) *Thompson* v. *Geary*, 5 Beav. 131.

INDEX.

The references to the Supplement are distinguished by the word Sup. prefixed to the paging.

B.

G.

O.

P.

London: Printed by C. Roworth and Sons, Bell Yard, Temple Bar.

THE

LAW AND PRACTICE

OF

INJUNCTIONS:

WITH A

Supplement

CONTAINING

THE CASES DECIDED SINCE 1841.

BY

CHARLES STEWART DREWRY, ESQ.

BARRISTER AT LAW.

LONDON:

S. SWEET, 1, CHANCERY LANE, FLEET STREET,

Law Bookseller and Publisher;

HODGES AND SMITH, GRAFTON STREET, DUBLIN.

1849.

LONDON:
PRINTED BY C. ROWORTH AND SONS,
BELL YARD, TEMPLE BAR.

PREFACE TO THE SUPPLEMENT.

SINCE the publication of the original Treatise in 1841 a considerable number of cases has been decided,—the principles on which equity proceeds in the exercise of its prohibitory jurisdiction have been more fully explained,—and the practice has been consolidated and reduced to a more definite and positive system. Under these circumstances it has been thought that it would be useful to collect the new cases, referring them to the several heads of jurisdiction under which they properly fall. In the addition now made to the original work, the writer has endeavoured to explain the present state of the law and practice, and he believes that he has not omitted any material information.

A new, and, it is hoped, sufficiently extensive Index, to the original as well as to the new matter, has been added. The division of chapters and classification of subjects, which were resorted to in the original Treatise, have also been adopted

in the Supplement, as it has been thought that, whether the arrangement is the best that could be made or not, the convenience of the reader would be best consulted by adopting uniformity of arrangement.

New Square, Lincoln's Inn,
Easter Term, 1849.

PREFACE

TO THE ORIGINAL TREATISE.

IT is scarcely necessary to offer any apology for the publication of a new work on a subject which has only been treated by one learned writer, and that more than twenty years ago. The great extension, during the intervening period, of the subjects to which the relief by injunction is applicable, and the consequent addition to the collection of cases, illustrating the law on this head of equity, have appeared to the writer to make it probable that an Essay on the Law and Practice of Injunctions would now be acceptable to the profession.

The present work is confined strictly to an exposition of the law and practice.

The writer has not thought it advisable to include the usual accompaniment to practical works, viz. precedents of pleadings, forms of orders, and other similar matter; firstly, because such precedents and forms are already to be found in other works, particularly in the books of Practice, which are almost necessarily in the hands of every Chancery practitioner (*a*); and secondly, because, the

(*a*) For forms of orders, see Seton on Decrees, and the books of practice; and for precedents of bills, see 1 Equity Draftsman.

circumstances which give rise to injunction suits are of such endless variety, as to render precedents of bills and other pleadings nearly useless.

The new Orders of August, 1841, were not issued till after the whole of the work was printed. It does not appear, however, that those orders have any direct and special bearing on the practice in matters of injunction.

Chancery Lane,
Oct. 1841.

INTRODUCTION.

AN Injunction may be described as a prohibitory writ, issuing out of Chancery to restrain the defendant from using some legal right, the exercise of which would be contrary to equity and good conscience; or from doing some act inconsistent with the admitted or probable legal rights of the complainant, and with the due preservation of the property affected by the act sought to be restrained.

In practice, injunctions are of two kinds. An injunction of the first kind is grantable as an order *of course*, without reference to *merits*, upon the defendant's making default in appearing, or in pleading, answering, or demurring within the time prescribed by the practice of the Court(*a*). An injunction of the second kind is, on the contrary, always granted upon *merits*, and may, under circumstances, be granted at any stage of a suit, after the bill is on the file, without reference to whether the defendant has or has not made default.

An injunction of the first kind is properly called a *common injunction*, and is that which is most generally obtained in suits where the object of the injunction is to stay proceedings at law (*b*).

(*a*) 1 Newl. Pract. 324; 1 Smith's Pract. 601; and 10th Order, 1833; see also 2 Story's Eq. Jurisp. 177.

(*b*) To this circumstance, probably, it is owing that the common injunction is sometimes distinguished as that which is granted to stay proceedings at law. That is not, however, the true distinctive character of the common injunction. For though the

An injunction of the second kind is called a special injunction, because it is granted upon *special application*, and not as an order of course (*c*).

In practice the special injunction may be considered as subdivisible into two kinds, the first of which is grantable in certain urgent cases before appearance, and even without notice to the defendant, upon the merits shown by the *ex parte* statement of the plaintiff (*d*); and injunctions of this kind are called *ex parte* injunctions.

The second kind of special injunction is only granted upon the merits shown on both sides.

The *ex parte* injunction is frequently applied in cases of waste, infringement of patents and of copyright, and similar acts of injury to property, where delay might produce *irreparable injury;* and is not, except in a few rare cases of exception, applied to restrain proceedings at law (*e*). But all injunctions which are granted after answer, whether to restrain wrongful acts of a special nature, or to restrain proceedings at law or in other Courts, are made on notice, and on the special merits of the case, and fall therefore properly within the second class of special injunctions (*f*).

common injunction is never applied to stay waste and similar injuries to property; the special injunction is frequently applied to stay proceedings at law. The true distinction between the *common* and the *special injunction* is, that the former is obtained when the defendant has made default, as a common order, or *order of course*, to which no opposition can be offered; whereas the latter is always obtained on merits, and never as an order of course.

(*c*) 1 Newl. Pract. 335.

(*d*) 1 Newl. Pract. 335, 336.

(*e*) 18 Ves. 522; 2 Mer. 476; and see *Lane* v. *Williams*, 6 Ves. 798; see also *per* Lord Cottenham in *Thorpe* v. *Hughes*, 3 My. & C. 753.

(*f*) The term *special injunction* has been confined by a learned writer to that which is granted before answer on the complainant's application, supported by an affidavit of merits; and he speaks of the injunction obtained after answer upon notice of motion, as the *ordinary* injunction.* Another learned writer on practice has treated

* Lubé's Treat. of Eq. Plead. 68, 72.

I propose to consider the subject of Injunctions under three general divisions.

The first will comprise the discussion of the cases in which Equity will interfere by injunction to restrain a person from instituting or continuing judicial proceedings either in a Court of Equity, or in a Court of Law, or in some other Court neither of Law or Equity.

In the second will be considered the cases in which Equity interferes to restrain the commission of wrongful acts of a special nature, or acts inconsistent with the probable legal right of the complainant, and the due preservation of the property affected by the act sought to be restrained.

The third will be devoted to the consideration of the practice in obtaining, continuing, and dissolving injunctions.

As regards Injunctions for staying proceedings in Courts of Common Law and in other Courts, it may be stated as a general rule, illustrated by an abundance of case, that wherever a party by fraud, accident, or otherwise, has an advantage by proceeding in a Court of ordinary jurisdiction, which must necessarily make that Court an instrument of injustice, a Court of Equity, to prevent a manifest wrong, will interpose by restraining the party whose conscience is thus bound from using the advantage he has improperly

every injunction made upon *special application* (as distinguished from the injunction obtained of course on the defendant's making default), as a special injunction, whether made before or after answer.* This is also the classification adopted by Mr. Justice Story in his excellent work on Equity Jurisprudence, vol. ii. p. 177. And I have adopted it in this work, not only as the most accurate, but because it is the most consistent with the ordinary acceptation of the terms used by the profession.

* Newl. Pract. 335.

gained (*g*). Mr. Maddocks, in his Treatise on Chancery Practice (*h*), states the doctrine broadly, that in most of the cases of accident, mistake, account or fraud, in which equitable relief is afforded, a party proceeding at law will be restrained. "In short," says that learned writer, "it seems that wherever relief would be given in a Court of Equity against a legal right, an injunction will be granted to restrain proceedings at law in respect of such legal right."

An examination of the cases will show this proposition to be, as a general one, sufficiently correct; but the inquiry, which is the special subject of the following sheets, is not so much into the cases in which a conclusion can be arrived at that general and final relief is grantable, and that therefore an injunction might be obtained, as into those, in which the case not being ripe for final adjudication, is yet of such a nature and in such a stage as to justify the preliminary interference of equity by injunction. These, so far as regards injunctions to restrain a party from instituting or pursuing judicial proceedings, I propose to examine under the following general subdivisions.

I. Where the legal title of the defendant in equity is founded originally on some inequitable transaction, or is against public policy; or where not having been originally inequitable, it has been tainted with fraud, actual or constructive, by the subsequent conduct of the party claiming under it.

II. Where the plaintiff in equity has some equitable right to set up against the plaintiff in the other Court, of which that Court cannot either by reason of want of jurisdiction, or by reason of its forms of proceeding, take

(*g*) Lord Red. 127. (*h*) Vol. i. 107.

cognizance; or where the legal right of the plaintiff at law is coupled with and abridged by some equitable liability.

III. Where relief is sought against forfeiture or penalties incurred by the breach of covenants, or the neglect of other legal liabilities.

IV. Cases illustrating the principles and limits of the jurisdiction of equity to grant relief by way of injunction.

In discussing injunctions to restrain acts of a special nature, wrongful, or inconsistent with the preservation of the property in dispute, the subjects of consideration have been found to range themselves most conveniently under certain familiar heads of equitable jurisdiction, such as waste, copyright, &c. I have not therefore attempted in that part of the present work to classify the different cases to which the relief by injunction is applicable, otherwise than by reference to those established heads of equity; and injunctions to stay wrongful acts of a special nature will be considered under the following heads :—

Injunctions for restraining waste, and infringement of copyright, and of patent rights; to restrain the publication of secret inventions; the use of trade marks and designations; and nuisance; injunctions acting in aid of specific performance, by restraining the breach of agreements; and to restrain breach of actual or implied trust; injunctions in matters of partnership and bankruptcy, and in matters arising out of the relations between public companies and individuals; injunctions to assist the trial of legal rights by removing mere legal impediments; and injunctions in interpleader suits; and, lastly, certain cases of injunction, illustrating generally the nature and extent of the jurisdiction of equity.

In the Third Part I shall discuss the practice of the

Court of Chancery with reference, I. To the mode of obtaining both the common and the special injunction; II. To the extension of the common injunction to stay trial; III. To the effect on an injunction of amending the bill; IV. To what constitutes breach of an injunction and what are the consequences of such breach; and V. To the mode of dissolving injunctions.

Many points of practice will also be found discussed in other parts of the work, where they have incidentally arisen in the cases more immediately under discussion. These it has not been thought necessary to repeat in the part particularly appropriated to the discussion of the Practice.

CONTENTS.

PART I.

OF STAYING PROCEEDINGS AT LAW AND IN OTHER COURTS.

CHAPTER I.

Of Injunctions to stay Proceedings at Law where the Legal Title of the Defendant in Equity is founded originally on some inequitable Transaction; or is against Public Policy; or where, although the Legal Title of the Defendant in Equity may not have been originally inequitable, it has been tainted with Fraud, actual or constructive, by the subsequent Conduct of the Party claiming under it . { Pages in Treat. 1—47 / Sup. 1— 6

Supplement.

CHAPTER II.

Of Injunctions to stay Proceedings at Law where the Plaintiff in Equity has some Equitable Right to set up against the Plaintiff at Law, of which the Court of Law cannot, either by reason of Want of Jurisdiction, or by reason of its Forms of Proceeding, take Cognizance; or where the Legal Right of the Plaintiff at Law is coupled with, and abridged by, some Equitable Liability. . . { Pages in Treat. 48—75 / Sup. 7—18

Supplement.

CHAPTER III.

Where Relief is sought against Forfeiture or Penalties incurred by the Breach of Covenants or the Neglect of other legal Liabilities.

Treat. page 76—94; Sup. 13

Supplement.

CHAPTER IV.

Supplement.

PART II.

OF INJUNCTIONS TO STAY WRONGFUL ACTS OF A SPECIAL NATURE.

CHAPTER I.

Supplement.

CHAPTER II.

Injunctions to restrain Infringement of Copyrights.

Treat. page 191—219; Sup. 32—40

Supplement.

CHAPTER III.

Of Injunctions to restrain the Infringement of Patents.

Treat. page 220—227; Sup. 41—52

Supplement.

CHAPTER IV.

Of Injunctions to restrain the Publication of secret Inventions, and the Use of another's Name or Designation; and the Imitation of Trade Marks . . . . . Treat. page 228—236; Sup. 53—57

Supplement.

CHAPTER V.

Of Injunctions to restrain Nuisance, Treat. page 237—249; Sup. 58, 59

Supplement.

CHAPTER VI.

Of Injunctions in Aid of specific Performance; and to restrain Breach of Trust or Confidence . . . Treat. 250—278; Sup. 60—68

Supplement.

CHAPTER VII.

Supplement.

CHAPTER VIII.

Supplement.

CHAPTER IX.

Injunctions in Matters of Bankruptcy . Treat. page 305—316; Sup. 74

Supplement.

CHAPTER X.

Supplement.

CHAPTER XI.

Supplement.

CHAPTER XII.

Supplement.

PART III.

OF THE PRACTICE IN MATTERS OF INJUNCTION.

CHAPTER I.

OF THE MODE OF OBTAINING INJUNCTIONS.

Section I.

As to Injunctions to stay Proceedings at Law,

Treat. pages 345—363; Sup. 81—84

Supplement.

Section II.

As to Special Injunctions . . **Treat. page 364—375; Sup. 84—86**

Supplement.

CHAPTER II.

Extending the Common Injunction to stay Trial.

Supplement.

CHAPTER III.

Of the Effect on Injunctions of Amendments; and of receiving an Injunction . . . . . .

Supplement.

CHAPTER IV.

Of Breach of an Injunction and its Consequences.

Treat. page 398—407; Sup. 94—96

Supplement.

CHAPTER V.

OF THE PRACTICE IN DISSOLVING INJUNCTIONS.

Section I.

As to dissolving Injunctions to stay Proceedings at Law.

Treat. page 408—427; Sup. 97—102

Supplement.

Section II.

Of dissolving Special Injunctions. Treat. page 427—432; Sup. 102—106

Supplement.

TABLE OF CASES.

The Cases in the Supplement are included and distinguished by the word Sup. prefixed to the paging.

N.

ERRATUM ET CORRIGENDUM.

P. 391, line 4, for " where *it* has"—read " where *an injunction* has."

In p. 333 of the Treatise, the 46th General Order of 1828 should have been referred to, by which it is ordered, " That every application to stay proceed- " ings upon any decree or order which is appealed from, be made first to the " judge who pronounced the decree or order."